

MENU LABELING LAWS: THE RIGHT TO NUTRITIONAL INFORMATION?

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I. Introduction

Since the passage of Nutrition Labeling and Education Act in 1990, there has been much debate about whether restaurants should be required to provide nutritional values on menus and menu boards. This issue had been highly contested by the food service industry because billions of dollars each year are spent by consumers eating away from home.¹ Despite these objections, by middle of the last decade, state and local government began passing laws that required food service establishment to post nutritional information on menus and menu boards (menu labeling laws).²

Economists, however, have debated whether this is a matter of public or private concern.³ Supporters of menu labeling claim these laws are effective tool to combating obesity and other dietary related diseases.⁴ Consumers should be entitled to know information that will assist them in making better dietary choices. Whereas critics claim, personal choices are the reason for dietary disease. Ultimately, consumer behavior will

¹. Christina A. Roberto et al, *Rationale and Evidence for Menu-Labeling*, 37 AM. J. PREVENTIVE MED.546, 551 (2009) [hereinafter Roberto].

². See generally S. B. 1171 (Cal. 2004) (introduced), available at http://info.sen.ca.gov/pub/03-04/bill/sen/sb_1151-1200/sb_1171_bill_20040203_introduced.html

³. See BRIAN BOLLINGER, PHILLIP LESLIE, & ALAN SORENSEN, CALORIE POSTING IN CHAIN RESTAURANTS, STANFORD UNIVERSITY & NBER, 1, available at <HTTP://WWW.STANFORD.EDU/~PLESLIE/CALORIES.PDF> [hereinafter Stanford Study]

⁴. 111 Cong. Rec S5522-5523 (daily ed. May, 14 2009)(statement of Sen. Harkin)[hereinafter Harkin].

decide how nutritional information is provided. Therefore, free market forces will address these problems.⁵

Finally, in 2010, the Federal Government passed a national menu labeling law that requires mandatory posting of calorie contents on menus and menu boards.⁶ Despite its early objections, the food service industry supported this new menu labeling law.⁷ However, there are still some doubts about the effects of this law. This law is only beneficial to public, if its long term benefits outweigh the costs of pass this legislation. Therefore, it is important to look back at the history of food labeling, the purpose of this type of legislation, and what are the most effective ways of achieving its stated goals.

II. Background

A. The NLEA

In 1990, Congress amended the Federal Food, Drug, and Cosmetic Act (FD&C) by passing the Nutrition Labeling and Education Act (NLEA).⁸ The NLEA's goals was to "clarify and to strengthen the Food and Drug Administration's legal authority to require nutrition labeling on foods, and to establish the circumstances under which claims may be made about nutrients in food."⁹ Specifically, the NLEA requires nutritional

⁵. Roberto, *supra* note 1, at 547 – 550.

⁶. See Patient Protection and Affordable Care Act, H.R. 3590 §4205 Nutrition Labeling of Standard Menu Items At Chain Restaurants

⁷. *National Restaurant Association Says Nutrition Information Provision is Win for Consumers and Restaurants, available at* <http://restaurant.org/pressroom/pressrelease/?ID=1910>

⁸. 21 U.S.C § 343(q)

⁹. H.R. Rep. No 101-538, at 7 (1990), reprinted in 1990 U.S.C.C.A.N. 3336, 3337.

information to be placed on food labels.¹⁰ This purpose of this information was to help American consumers make purchasing decisions.¹¹ At the time of the NLEA's passage, the Surgeon General was advising Americans, that diets low in fat, low in salt and high in fiber would reduce the risk of certain diseases.¹² Congress believed this nutritional information would assist Americans in maintaining a balanced and healthy diet and reinforce the Surgeon General's recommendation.¹³

The NLEA requires mandatory nutrition labeling on most food sold in stores. This information is usually found on the "Nutritious Facts" panel of packaged foods. The "Nutritious Facts" panel is a standardized section on food packages, which provides mandatory information about nutrients and other basic nutritional facts.¹⁴ Mandatory labeling requirements include the serving size, the number of servings, the total number of calories, and the amounts of other certain nutrients.¹⁵

The NLEA, however, expressly exempted restaurants from providing mandatory nutritional information.¹⁶ Therefore, restaurants were not required to provide the calorie content or any other nutritional facts about the food they served. Only if a restaurant

¹⁰. 21 U.S.C § 343(q)

¹¹. H.R. Rep. No 101-538, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3336, 3337.

¹². *Id.*

¹³. *Id.*

¹⁴. 21 U.S.C § 343(q).

¹⁵. 21 U.S.C § 343(q) (1) (These nutrients include the amount of total fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugar, dietary fiber, and total protein in each serving size or other unit of measure.)

¹⁶. 21 U.S.C § 343(q) (5)(A)(i).

makes a specific “claim” about its food content, is a food service establishment covered under the NLEA’s provisions.¹⁷ This type of “claim” is usually when a restaurant uses certain terms (such as “low salt” or “light”) to describe its food.¹⁸ Congress, at the time, believed requiring nutritional labeling at restaurants would be “impractical.”¹⁹

B. The New York Experience

Since the NLEA’s passage in 1990, state and local governments have been left with the task of requiring restaurant to post or make available nutritional information.²⁰ For the first decade after the NLEA’s passage, this area was left mostly unregulated. During this time, state and local governments did not require mandatory posting of caloric information on menus or menu boards. However, interest in adopting menu labeling laws began to increase in the second decade after the NLEA’s passage.²¹ As early as 2003, state governments began proposing legislation that would require restaurants to make the caloric content of menu items available.²²

¹⁷ . 21 U.S.C § 343(r).

¹⁸ . H.R. Rep. No 101-538, at 7 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3336, 3337.

¹⁹. *Id* (Congress did not state expressly why labeling at restaurants would be impractical).

²⁰. *See* N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir 2009).

²¹ . Anthony K. Marks, *Menu Label Laws: A Survey*, 29 FRANCHISE L.J. 90, 90-91 (2009).

²² See e.g. LD391 (Me. 2003)(introduced) (“requiring any with 20 or more locations under the same name nationwide to display calorie information for all standard food and drink items sold on menu boards, menus, and packaging); SB 679 (Cal. 2003)(introduced) (requiring fast food and other chains that have 10 or more locations nationally and in California to provide nutrition information upon request, and also to post a sign saying that such information is available); A5520 (N.Y. 2003)(introduced) (requiring chain restaurants {food establishments with 10 or more locations nationwide and 5 or more in New York} to provide calorie, saturated fat plus trans fat, carbohydrate, and sodium information for typical food and beverage items sold on a standard, printed menu.

In 2006, New York City became the first locality to adopt menu labeling requirements.²³ At the time of its adoption, no other Governmental body had implemented mandatory nutritional labeling on menus or menu boards. The Department of Health and Mental Hygiene adopted §81.50 of the New York City Health Code to provide “simple, point-of-purchase calorie information” at restaurants.²⁴ Section 81.50 required food service establishments (FSEs) to post the “calorie content values that have already been made publicly available” next to the listing of each menu item.²⁵ These postings were required on menus and menu boards in a size and typeface that was “at least as large as the name of the menu item or price.”²⁶ This regulation would have affected roughly ten percent of the permitted establishment in New York City.²⁷ In an attempt to lessen the burden on FSEs, the provision did not require any restaurants to engage in any analysis of the nutritional content of its menu items.²⁸ Therefore, the regulation was only applicable to restaurants, which had already voluntarily disclosed nutritional information of their menu items.

The Department of Health and Mental Hygiene, whose responsibilities include preventing and controlling diseases, established that New York City needed to address

²³. N.Y. CITY BD. OF HEALTH, NOTICE OF ADOPTION OF AN AMENDMENT § 81.50 OF THE N.Y. CITY HEALTH CODE (Dec. 5, 2006) available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50.pdf>, invalidated by N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 509 F. Supp. 2d, 351 (S.D. N.Y. 2007)[hereinafter N.Y. CITY BD. OF HEALTH 2006]

²⁴ *Id.*

²⁵ N.Y. CITY BD. OF HEALTH § 81.50(b) (invalidated).

²⁶ N.Y. CITY BD. OF HEALTH § 81.50(b)(1) (invalidated)

²⁷. N.Y. CITY BD. OF HEALTH 2006, *supra note 23*

²⁸ . *Id.*

the” rapidly growing twin epidemics of obesity and diabetes.”²⁹ The Department found that nutritional information on packaged food, required by NLEA, affected consumer behavior.³⁰ However, this information was not accessible to restaurant patrons at the time of purchase, because FSEs were not required under federal law to provide mandatory nutritional information.³¹ The Department believed by providing this information at the point-of-purchase, patrons would be more likely to make informed decisions while eating out at restaurants; therefore, this information would assist consumers in decreasing excessive caloric intake related to obesity and other dietary related diseases.³²

The regulation was to become in effect on July 1, 2007.³³ However, before §81.50 was implemented, the regulation was challenged in a law suit brought by the New York State Restaurant Association (NYSRA).³⁴ On September 11, 2007, the District Court for the Southern District of New York held that the city’s regulation was expressly preempted by the Nutrition Labeling and Education Act.³⁵ The court did not consider whether Regulation 81.50 was an effective means to combat obesity or improves public health.³⁶ Justice Holwell asserted that the regulation’s application was limited to

²⁹. *Id.*

³⁰. *Id.* (48% of Americans report that nutrition information on packaged had caused them to change their purchasing habits.)

³¹. 21 U.S.C § 343(q) (5)(A)(i).

³². N.Y. CITY BD. OF HEALTH 2006, *supra note 23*

³³. N.Y. CITY BD. OF HEALTH § 81.50(C) (invalidated)

³⁴. N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 509 F. Supp. 2d, 351 (S.D. N.Y. 2007)

³⁵. *Id* at 363.

³⁶. *Id* at 354.

restaurants that already voluntarily made public the caloric value of their food.³⁷ By making the regulation's requirements contingent on a voluntary "claim," §81.50 operated precisely in the same manner as the NLEA.³⁸ Therefore, the Court held that §81.50 was preempted by NLEA's regulatory scheme.³⁹ Judge Holwell then noted, if New York City adopted a mandatory labeling requirement for all restaurants, regardless of whether or not the nutritional information was already available, it would appear to fall outside the scope of preemption.⁴⁰

After losing this lawsuit, The New York City Department of Health redrafted their menu labeling regulations.⁴¹ A revised §81.50 was adopted on January 22, 2008.⁴² The Department's objective was once again to prevent obesity due to excessive caloric consumption.⁴³ The new regulation covered only food service establishment within New York City that are a part of a chain of 15 or more establishments doing business nationally.⁴⁴ The Department also found, when restaurants voluntarily provide nutritional information; they are woefully inadequate in helping patrons make decision.⁴⁵

³⁷. *Id* at 355

³⁸. *Id* at 362 -363

³⁹. *Id*

⁴⁰. *Id* at 363

⁴¹. N.Y. CITY BD. OF HEALTH, RESOLUTION TO REPEAL AND REENACT § 81.50 OF THE N.Y. CITY HEALTH CODE (Jan 22, 2008), available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-50-0108.pdf> [hereinafter N.Y. CITY BD. OF HEALTH 2008]

⁴². *Id.*

⁴³. *Id*

⁴⁴. N.Y. CITY BD. OF HEALTH § 81.50(a)(1)

⁴⁵. N.Y. CITY BD. OF HEALTH 2008, *supra* note 41.

Therefore, the new menu labeling regulation required calorie content values to be based upon “verifiable analysis of the menu item.”⁴⁶

The NYSRA challenged the revised regulation.⁴⁷ Once again, the Association claimed that Section 81.50 was preempted by federal law and that it violated the First Amendment protections of commercial speech.⁴⁸ The District Court for the Southern District of New York dismissed both claims and upheld the New York City regulation.⁴⁹ On appeal, the United States Court of Appeals for the Second Circuit affirmed the lower court’s decision.⁵⁰ The Second Circuit held that the revised regulation was not preempted by the NLEA’s regulatory scheme.⁵¹ The Court found, even though Congress exempted food service establishments from the NLEA, it left authority to state and local governments to require nutritional information on menus and menu boards.⁵² The Court then held that regulation 81.50 does not impermissibly infringe on the First Amendment rights of the NYSRA’s members. The Court explained that the city’s goal of combating obesity was reasonably related to this regulation.⁵³

⁴⁶. N.Y. CITY BD. OF HEALTH § 81.50(c)(1).

⁴⁷. N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, *available at* WL1752455 (S.D.N.Y 2008).

⁴⁸. *Id*

⁴⁹. *Id*

⁵⁰. N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir 2009).

⁵¹. *Id* at 130-132.

⁵². *Id* at 118.

⁵³. *Id* at 135-136

After New York City, other jurisdictions such as King County (Seattle), Washington,⁵⁴ Philadelphia, Pennsylvania,⁵⁵ and San Francisco, California⁵⁶ implemented similar city ordinances. In 2008, California became the first state to pass a statewide nutrition labeling law.⁵⁷ This new would eventually require restaurants to post calorie content values on menus and menu boards.⁵⁸ By 2009, a patchwork of state and local menu label laws existed, with an increasing amount of laws being introduced by various legislative bodies.⁵⁹

C. The Patient Protection and Affordable Care Act Section 4205

In response to this trend, bills were proposed in both the House⁶⁰ and the Senate.⁶¹ Both bills supported requiring nutritional content on menus and menu boards, but differed on whether the new federal law would preempt state and local regulations.⁶² Finally, on March 23, 2010 the Patient Protection and Affordable Care Act was signed

⁵⁴. See <http://www.kingcounty.gov/healthServices/health/nutrition/healthyeating.aspx>

⁵⁵ See <http://cspinet.org/new/200811061.html>

⁵⁶ See <http://www.nrn.com/breakingNews.aspx?id=351510>

⁵⁷ . Cal. Health & Safety Code § 114094

⁵⁸. *Id* (signed into law in September 2008 but not to be fully implemented until 2011. California chose to phase in menu labeling regulations by requiring restaurant to provide nutritional information accessible to consumer by brochures in 2009 and nutritional information to be directly on menus and menu boards by 2011).

⁵⁹. Anthony K. Marks, *Menu Label Laws: A Survey*, 29 FRANCHISE L.J. 90, 90-94 (2009).

⁶⁰ . H.R. 2426 S. 558, 111th Cong. (2009)(The Lean Act)

⁶¹ . H.R. 1398 S.1048 111th Cong. (2009)(The MEAL Act)

⁶² . See *id*

into law by President Barack Obama.⁶³ This health care reform legislation included Section 4205, which amended the Federal Food, Drug, and Cosmetic Act.⁶⁴ This section requires mandatory labeling of food sold at restaurants, similar retail food establishments and vending machines.⁶⁵ Unlike the NLEA, Section 4205 does not intentionally leave open labeling regulations of restaurants for state and local governments.⁶⁶ Therefore, Section 4205 preempts state and local menu labeling laws that are materially different.⁶⁷

This Act contains three specific requirements for restaurants and similar food establishments: (1) To post the calories contained in a standard menu item adjacent to the name of the item on menus and menu boards, (2) display a succinct statement concerning the daily caloric intake, and (3) make available additional nutritional information upon request.⁶⁸ The Act limits its coverage to food service establishments and vending machines that are part of a chain of 20 or more locations.⁶⁹ However, FSE's and vending machine operator may choose to be covered under this Section.⁷⁰ Section 4205 also requires the FDA to promulgate proposed regulations to carry out labeling requirements within one year after its enactment.⁷¹ The FDA will need to consider the required font

⁶³. H.R. 3590 §4205

⁶⁴. *Id.*

⁶⁵. *Id.*

⁶⁶. *Id.*

⁶⁷. See H.R. 3590 §4205(c), (d)

⁶⁸. H.R. 3590 §4205 (b) at 1207

⁶⁹. *Id.* at 1206.

⁷⁰. *Id.* at 1211.

⁷¹. *Id.* at 1212.

size and contrast of postings, the standardization of recipes and methods of preparation, the variations of serving sizes, and other factors when proposing these regulations.⁷²

III. Does Menu Labeling Work?

Much has been debated about whether obesity and other health related diseases are matters that should be regulated by public health laws. Despite the recent popularity of mandatory nutritional labeling at restaurants,⁷³ critics have claimed that menu labeling laws are ineffective and burdensome on the food service industry.⁷⁴ Some representatives of the food service industry claim there is a lack of evidentiary support to prove that menu labeling can causes a decrease in dietary related diseases.⁷⁵ Some restaurants have asserted that they are being “forced to communicate a message that they don’t believe.”⁷⁶ Critics of these types of laws believe that dietary problems are a matter of personal responsibility.⁷⁷ Therefore, governmental regulations are not the proper method to reduce the occurrences of these ailments. If there was substantial public

⁷². *Id.*

⁷³. *New York City Rave Review for Menu Labeling*, available at http://www.cspinet.org/new/pdf/nyc_review_fact_sheet.pdf

⁷⁴. See Jean Spencer & Shirley S. Wang, *Coming to the Menu: Calorie Counts*, WALL ST. J., Mar. 24, 2010 at A4.

⁷⁵. Brief for Plaintiff-Appellant, N.Y. State Rest. Ass’n v. N.Y. City Bd. of Health, 556 F.3d 114 (2d Cir 2009) (No. 08-1892), 2008 WL 6513103.

⁷⁶. *Id.*

⁷⁷. See generally Roberto, *supra* note 1 at 547-548 (describing argument but also rebutting it)

demand for this information, then free market forces would cause restaurants to elicit this information on menus and menu boards.⁷⁸

Conversely, many menu labeling advocates have argued, the government must be proactive in combating diseases related to poor nutrition.⁷⁹ These proponents claim that studies have found that food labeling does affect consumer behavior.⁸⁰ Menu labeling laws are only a small part of the solution to America's dietary problems.⁸¹ While studies may be inconsistent about the effects of these laws, the goal of food labeling is to help consumers make more informed choices. This information empowers consumers to be more responsible. Furthermore, some consumer advocates have argued, regardless of the affect these laws may have on the obesity epidemic, restaurant patrons are entitled to know about the food they order at time of their purchase.⁸²

Menu labeling laws do provide more information to consumers; however, providing more information to restaurant patrons does come at a cost. Therefore, it is important to know whether the benefits of providing such information outweigh its costs.⁸³ In order to know whether menu labeling should be required, it is critical to look at the effects this law will have on consumers and the food service industry. If menu

⁷⁸. See generally *id.*

⁷⁹. Harkin, *supra* note 4.

⁸⁰. N.Y. CITY BD. OF HEALTH 2006, *supra* note 23

⁸¹. Harkin, *supra* note 4.

⁸². See Roberto, *supra* note 1.

⁸³. See Stanford Study, *supra* note 3 at 28.

labeling is required, legislatures must consider the most effective ways to implement these laws to achieve its stated goals.

A. Background: The Obesity Epidemic and other Health Related Problems

One of the primary purposes of menu labeling requirements is to combat obesity and other dietary related diseases.⁸⁴ Americans have become less active and have grown accustom to eating unhealthy diets.⁸⁵ According to the USDA's Healthy Eating Index, only 12 percent of Americans eat a healthy diet.⁸⁶ As Americans continue to eat unhealthy diets the number of health related problems, such as obesity, heart disease, cancer, stroke, diabetes, high blood cholesterol, and high blood pressure continue to increase.⁸⁷ The negative health consequences of these problems are evident, as they can lead to premature death, disabilities and high health care cost.⁸⁸ As obesity rates have doubled in adults over the last twenty years, the United States has become the obese

⁸⁴ . N.Y. CITY BD. OF HEALTH 2006, *supra* note 23; N.Y. CITY BD. OF HEALTH 2008, *supra* note 41; Harkin, *supra* note 4

⁸⁵ . See Claudia Kalb, *Culture of Corpulence*, NEWSWEEK, Mar. 22, 2010, at 43 [hereinafter Kalb].

⁸⁶ . ANYONE'S GUESS: THE NEED FOR NUTRITION LABELING AT FAST-FOOD AND OTHER CHAIN RESTAURANTS, (Center for Science in the Public Interest Nov. 2003), available at <http://www.cspinet.org/restaurantreport.pdf> [hereinafter Anyone's Guess].

⁸⁷ . *Id.*

⁸⁸ . *Id.*

nation in the world.⁸⁹ Some health advocates have considered this epidemic as greatest challenge of our time.⁹⁰

Problems related to poor nutrition have a substantial affect on an individual's physical and mental well-being. According to the US Department of Health and Human Services, poor diets along with physical inactivity cause an estimated 310,000 to 580,000 premature deaths each year. This number is five times greater than number of people killed by guns, AIDS, and drug use combined.⁹¹ Furthermore, Americans that have disabilities from poor diets often lose their independence.⁹² These individuals may be forced to rely on others to help provide them with support.

Poor diet and nutrition can also have a substantial effect on an individual personal life as well. People who suffer from obesity and other weight related diseases may have low self-esteem and may feel that their physical appearance is socially unacceptable.⁹³ Dietary related diseases can even cause some people to become ineligible for jobs they may want. Currently, being overweight has been cited as the number one reason recruits are being turned away from the military.⁹⁴ Along with the physical problems these ailment can have on individuals, the monetary costs of treating these conditions can be burdensome. Recent studies have found that American families, businesses, and

⁸⁹. *Id.*

⁹⁰. *Id.*

⁹¹. *Id*

⁹². *Id*

⁹³. Kalb, *supra* note 85.

⁹⁴. *Id*

governments spend about 117 billion dollars each year treating obesity and other healthcare related costs.⁹⁵

B. Is Menu Labeling the Best Method To Address Dietary Related Diseases?

i. Government Intervention vs. Personal Responsibility

Menu labeling proponents believe that the government needs to respond to these dietary related problems. Menu labeling laws are considered as only one part of the solution of combating obesity and other related dietary problems.⁹⁶ Poor nutrition is a complex issue, that cannot be solved a single government initiative.⁹⁷ However, inaction by the government should not be considered as an option.⁹⁸ Therefore, the government should address this issue with a comprehensive approach, which includes collecting data, raising public awareness, and passing new laws.⁹⁹ By providing this information, the Government is giving consumers the tools they to make informed decisions.

⁹⁵ . Anyone's Guess, *supra* note 86.

⁹⁶ . Harkin, *supra* note 4.

⁹⁷ . *Id.*

⁹⁸ . *Id.*

⁹⁹ . Kalb, *supra* note 85 at 44.

However, critics of this law suggest that governmental intervention is unwarranted. Obesity and other dietary related problems are matter of personal responsibility.¹⁰⁰ The Government should not be telling consumers what types of foods they should and should not eat. By passing mandatory nutrition labeling requirements, the Government is micromanaging the business decision of restaurants and pressuring consumers to eat healthier foods.

Polls from localities that have mandatory menu labeling laws show overwhelming support for this legislation.¹⁰¹ Many consumers believe that have right to know what is in their food. This information allows consumer to exercise personal responsibility over their dietary choices. Furthermore, the Government has passed similar laws “to protect the public’s health, safety, and welfare.”¹⁰² Menu labeling is consistent with other types of laws that require producers to disclose information about their products.¹⁰³

However, if this information was important to consumers, then free-market forces should dictate whether or not nutritional labeling is placed on menus. Dietary choices are personal decisions made by consumers. If consumers wanted this information, they would dine out at restaurants that voluntarily provide nutritional information on their menus. For example, Panera Bread Company has recently decided

¹⁰⁰ . Liz Farmer, *Commentary: Could Menu Labeling set a dangerous precedent?*, Daily Record, Feb 18, 2010.

¹⁰¹ . *New York City Rave Review for Menu Labeling*, available at http://www.cspinet.org/new/pdf/nyc_review_fact_sheet.pdf

¹⁰² . Roberto, supra note 1 at 548

¹⁰³ *Id.* (For example packaged food, clothing labels, prescription drugs and cleaning products must all reveal content information to consumers)

to voluntarily provide nutritional information on their menus.¹⁰⁴ As popularity increases at these restaurants, competitive forces would cause other restaurant to post nutritional information on their menus as well. Furthermore, if consumers wanted healthier items on menus, demand for these products would also increase. Currently restaurants are already starting to offer more low-calorie alternatives.¹⁰⁵

However, free market forces may not be able operate when consumer lack key information.¹⁰⁶ When nutritional information is not provided to consumers there is an imbalance of information between what buyer and sellers know.¹⁰⁷ Many consumers may want low-calorie alternatives, but make choices that are inconsistent with this preference.¹⁰⁸ Thus, demand for these products will not increase. Therefore, restaurants will not make low-calorie options that are consistent with this preference.

ii. Will Consumers Use Nutritional Information to Reduce Caloric Intake?

The United States Food and Drug Association found that many Americans cannot determine the number of calories in a meal without nutritional information.¹⁰⁹ Many of

¹⁰⁴. See Panera Bread First National Restaurant Concept to Post Calorie Information on All Menu Boards, available at <http://www.panerabread.com/pdf/pr-20100310.pdf>.

¹⁰⁵. Kalb, *supra* note 85 at 44.

¹⁰⁶. Roberto, *supra* note 1 at 548

¹⁰⁷. *Id.*

¹⁰⁸. *Id.*

¹⁰⁹. The Keystone Center, The Keystone Forum on Away-From-Home-Foods: Opportunities for Preventing Weight Gain and Obesity (2006), available at http://keystone.org/files/file/about/publications/Forum_Report_FINAL_5-30-06.pdf

these consumers are underestimating the caloric values of the food they purchase.¹¹⁰ For instance, consumers may be surprised to find that a large McDonald's shake contains almost twice as many calories as a McDonald's hamburger, small French fries, and small Coca-Cola Classic combined¹¹¹ or, that one beverage at Starbucks can contain over a quarter of the amount calories that are recommended daily.¹¹² Treats, such as desserts and coffee, are not the only items that may have more calories than expected. Even some foods that may appear to be healthy, such as salads and "light" items, can also contain a surplus of calories.¹¹³

While obesity and other health related conditions continue to be persistent, it is uncertain whether menu labeling laws will reduce the occurrence of such ailments. Many consumers eat out because it is convenient and easy.¹¹⁴ Many of these consumers may already know that their food is unhealthy. Therefore, it has been argued that consumers do not care about this information or already informed about the contents of the food they eat.¹¹⁵ History has also provided some evidence that consumers do not use nutritional information to eat healthier diets. The NLEA, which requires nutritional labels on

¹¹⁰. Burton S. Creyer et al., Attacking the Obesity Epidemic: The Potential Benefits of Providing Nutrition Information in Restaurants, 96(9) AM. J. PUBLIC HEALTH 1669 (2006).

¹¹¹. McDonald's USA Nutrition Facts for Popular Menu Items, available at <http://nutrition.mcdonalds.com/nutritionexchange/nutritionfacts.pdf> (Large 42oz milkshake at McDonald's contains 1010 calories whereas burger, fries, and drink only contain 640 calories).

¹¹² . <http://www.starbucks.com/menu/catalog/nutrition?drink=frappuccino-blended-beverages> (Starbucks has several drinks when ordered in 24oz venti size that have over 500 calories).

¹¹³ . See Anyone's Guess, *supra* note 86

¹¹⁴ . Kalb, *supra* note 85. at 44.

¹¹⁵ . See *Menu Labeling: Does Providing Nutrition Information at the Point of Purchase Affect Consumer Behavior?* (Robert Wood Johnson Foundation)(June 2009) available at <http://www.rwjf.org/files/research/20090630hermenulabeling.pdf> [hereinafter RWJ Foundation]

packaged foods, was passed in 1990.¹¹⁶ Despite the additional information provided to consumers by this Act, obesity and other dietary related diseases have continued to rise over the past two decades.¹¹⁷ Obesity rates have risen from 15.9% in 1995, to 26.6% in 2008.¹¹⁸

However, the rise in obesity rates may be caused partly because consumers are increasingly eating out, where no nutritional information is provided.¹¹⁹ Evidence has shown that eating outside the home is correlated with high calorie intakes and poorer nutrition.¹²⁰ Furthermore as portion sizes continue to increase at restaurants, patrons are unknowingly consuming more calories.¹²¹ When adults and children are served more food they eat more food. Many restaurant patrons are consuming more calories than are required for healthy diets.¹²² However, many Americans today are looking for healthier options when they eat.¹²³ By making this information more accessible to customers eating out, American will have control to make better choices about the food they eat.¹²⁴

iii. Are Menus and Menu Boards the Most Effective Place for Nutritional Information?

¹¹⁶. 21 U.S.C § 343(q)

¹¹⁷. See Stanford Study, *supra* note 3 at 1.

¹¹⁸. *Id.*

¹¹⁹. RWJ Foundation, *supra* note 115.

¹²⁰. Anyone's Guess, *supra* note 86

¹²¹. *Id.*

¹²². Speech of Jim Matheson for Introduction of the LEAN Act of 2009 (Mar. 9, 2009)

¹²³. *Id.*

¹²⁴. *Id.*

Many food service establishments consider menus and menu boards as the most valuable part of the restaurant.¹²⁵ Restaurants use this space as a way to communicate with their customers.¹²⁶ By adding additional information, menus and menu boards may become cluttered and difficult to understand.¹²⁷ Consumers may become confused and disregard the nutritional information altogether. This problem would defeat the purpose of having these required postings. Furthermore, some customers and restaurant owners may see this additional information as inconvenient. It may cause some consumers to overlook other important items on the menu, such as the cost, available items, promotions and daily specials.

Therefore, the most effective way to provide nutritional information is by mediums other than menus.¹²⁸ Many restaurants already provide nutritional information to consumers.¹²⁹ This information is usually accessible on tray liners, brochures, and on websites.¹³⁰ It has been argued, that these mediums would allow restaurants to provide comprehensive nutritional information more clearly, than it would be on a cluttered menu board. Furthermore, customers that are more likely to use this information will seek out access to it by one of these other means; whereas customers who are uninterested the

¹²⁵. Margo G. Wootan et al., *KIDS' MEALS: OBESITY ON THE MENU* (Center for Science in the Public Interest Aug.2008) available at <http://www.cspinet.org/new/pdf/kidsmeals-report.pdf> [hereinafter Wootan]

¹²⁶. *Id.*

¹²⁷. See Jacob Grier, Op. Ed., *Obamacare's menu labeling scheme won't work* , WASH EXAMINE, Jan 27, 2010 available at http://www.washingtonexaminer.com/opinion/columns/OpEd-Contributor/Obamacare_s-menu-labeling-scheme-won_t-work-82732537.html

¹²⁸. See *id.*

¹²⁹. *Id.*

¹³⁰. Wootan, *supra* note 125.

nutritional content of their meals will disregard this information no matter where it is placed.¹³¹

These alternative methods for providing nutritional content have been criticized. Menus and menu boards are one of the most effective ways consumer can learn about the food they are purchasing. Restaurants place important information such as the price, size and quantity of the menu items on this space.¹³² However, many customers may consider nutritional content just as important as the information already provided. Yet, it would be unreasonable for food service establishments to place other important content, such as price, only on brochures or other mediums.¹³³

Furthermore, consumers often eat out for convenience.¹³⁴ Brochures, websites, and tray liners are not convenient to customers because these mediums are not where consumers look when they are ordering their food.¹³⁵ For a website to be effective, a customer would have to go home and study a web page before eating out.¹³⁶ Tray liners are ineffective because customer usually don't see this information until after they order.¹³⁷ Brochures can contain too much information; therefore, can become time consuming and difficult to understand.¹³⁸ Menus and menu boards, however, provide a

¹³¹. RWJ Foundation, *supra* note 115.

¹³². Wootan, *supra* note 125.

¹³³. *Id.*

¹³⁴. *Id.*

¹³⁵. *Id.*

¹³⁶. *Id.*

¹³⁷. *Id.*

¹³⁸. *Id.*

common and effective medium that consumers can rely on. People will know where to look to find the amount calories in the food they are ordering. The restaurant industry should be more flexible when eliciting this information, because different methods may work better for different people.¹³⁹

C. Menu Labeling, Children, & Young Adults

i. Children & Dietary Related Problems

One important subgroup, that menu labeling laws are directed at, is children and young adult.¹⁴⁰ Children and young adults have become accustomed to eating unhealthy diets and living inactive lifestyles.¹⁴¹ The USDA has found, in general, children from ages 2 to 17 need significant improvements in their diets.¹⁴² Many children are consuming excessive amounts of saturated fats, sodium, and calories.¹⁴³ Children have become less physically active as well. Gym and recess are becoming less common in schools.¹⁴⁴ After school activities such as watching TV, playing video games, and surfing the Internet have replaced afternoons playing outside and getting exercise.¹⁴⁵

¹³⁹. See generally RWJ Foundation, *supra* note 115

¹⁴⁰. Wootan, *supra* note 125.

¹⁴¹. See Michelle Obama, *How We Can Empower Parents, Schools, and the community to Battle Childhood Obesity*, NEWSWEEK, March 22,2010 at 41 [hereinafter M. Obama]

¹⁴². The Quality of Children's Diets in 2003-04 as Measured by the Healthy Eating Index-2005 <http://www.cnpp.usda.gov/Publications/NutritionInsights/Insight43.pdf>

¹⁴³. *Id.*

¹⁴⁴. M. Obama *supra* note 141 at 41.

¹⁴⁵. *Id.*

Poor nutrition has caused an increase in dietary related problems for children and young adults.¹⁴⁶ Obesity rates have doubled in children and tripled in teens over the past two decades.¹⁴⁷ Nearly one in three children born in the year 2000, are predicted to develop type 2 diabetes.¹⁴⁸ One quarter of children ages 5 to 10 show early signs for heart disease.¹⁴⁹

ii. The Effects of Menu Labeling on Children & Young Adults

These dietary problems are caused partly because children and young adults are eating out more.¹⁵⁰ The dynamics of the family have changed profoundly over the last twenty years.¹⁵¹ Parents are working longer hours and family meals around the dinner table are becoming less common.¹⁵² Instead, home cooked family meals have been replaced by eating out at large chain restaurants. When children eat out, they consume twice the amount of calories than when they eat at home.¹⁵³ They also consume more saturated fat and less calcium and fiber.¹⁵⁴

¹⁴⁶ . *Id.*

¹⁴⁷ . Anyone's Guess, *supra* note 86

¹⁴⁸ . M. Obama *supra* note 141 at 41.

¹⁴⁹ . Wootan, *supra* note 125.

¹⁵⁰ . *See id.*

¹⁵¹ . RWJ Foundation, *supra* note 115.

¹⁵² . M. Obama *supra* note 141 at 41.

¹⁵³ . Wootan, *supra* note 125.

¹⁵⁴ . *Id.*

Children eat poorly at restaurants because most large chains have kid's menus that are dominated by unhealthy foods.¹⁵⁵ The most common entrees offered on kid's menus are burgers, fried chicken, and grilled cheeses.¹⁵⁶ Soft drinks are the most popular beverage and French fries are the most common side dish.¹⁵⁷ While healthier options are sometimes available, most of these meals offered to children (93%) are too high in calories.¹⁵⁸

Healthy options at restaurants need to become the standard and not the exception. When children are eating out, they need to be surrounded by food that encourages a healthy lifestyle and not food that will make them sick.¹⁵⁹ Ideally restaurants would only offer children the most healthful food and beverages.¹⁶⁰ Instead of burgers, French fries, and a soft drink, children would be ordering healthier options such as grilled chicken, fresh fruit, and water. But many restaurants would have to undergo major changes to market only healthy food to children.¹⁶¹ Furthermore, no one believes that the answer to dietary related disease in children is to have the Government tell people what to do.¹⁶²

¹⁵⁵. *Id*

¹⁵⁶. *Id*

¹⁵⁷. *Id*

¹⁵⁸. *Id*

¹⁵⁹. Kalb, *supra* note 85, at 44

¹⁶⁰. Wootan, *supra* note 125.

¹⁶¹. *Id.*

¹⁶². M. Obama *supra* note 141 at 41.

Therefore, the Government should adopt policies that “provide children at a young age nutritional education to help them improve their diets.¹⁶³ Menu labeling laws are one way that the government can help kids lead a healthier lifestyles. Studies have shown that when nutritional information is available, parents are more apt to pick low calorie options for their kids.¹⁶⁴ On average, parents choose meals that are 100 calories less when ordering for their three to six year old kids.¹⁶⁵ This difference is a significant amount of calories for a child and can have substantial affect on his or her well-being. Also, children may become more accustomed to eating healthier meals at young age. Parents are often considered as role models for their children.¹⁶⁶ Parents can set a healthy example for their children by using nutritional calorie content values to eat more nutritious meals.¹⁶⁷

There may be some doubt whether calorie posting will have any impact on the dietary choices made by children and young adults. Children and young adults may be less likely to understand caloric information posted on menus. Also, parents may not be involved in the dietary decisions of their children; this may be especially true for children who this information would be most benefit the most.

¹⁶³ . *Id*

¹⁶⁴ . Steven Reinberg, *Listing Calories on Fast-Food Menus Cuts Kids’ Intake*, BUSINESSWEEK, Jan 25,2010, available at <http://www.businessweek.com/lifestyle/content/healthday/635275.html> [hereinafter Reinberg]

¹⁶⁵ . *Id*

¹⁶⁶ . *Id*

¹⁶⁷ . *Id*

Even if a young adult understood that healthier options are available, they may still choose the menu items that they liked the best. Children's menus are filed with unhealthy foods because these are the types of things children want to eat. Furthermore, inactivity is also one of the primary reasons for childhood obesity and other related diseases.¹⁶⁸ Nutritional information will not cause children to have more active lifestyles. Therefore, the affects of nutritional posting may be negligible.

IV. The Stanford University Study: What We Have Learned from New York City

a. The Study

In January, 2010, Stanford University released a study on the effects of menu labeling laws in New York City.¹⁶⁹ The study observed every transaction at Starbucks stores within New York City from January 1, 2008 to February 28, 2009.¹⁷⁰ With mandatory calorie posting in New York City beginning on April 1, 2008, this 14 month period of collecting data included, 3 months before and 11 months after calorie posting commenced.¹⁷¹ During this same time period, the study also observed every transaction at Starbucks stores in Boston and Philadelphia, where there was no calorie posting requirements.¹⁷² In addition to these transactions, the study also observed the purchases

¹⁶⁸ . See generally M. Obama *supra* note 141 at 41.

¹⁶⁹ . See Stanford Study, *supra* note 3.

¹⁷⁰ . *Id.* at 5

¹⁷¹ . *Id.*

¹⁷² . *Id.*

of a large group of anonymous Starbucks cardholders.¹⁷³ This sample consisted of cardholder inside and outside of New York City.¹⁷⁴ However, the majority of the cardholders did not make any purchases inside New York.¹⁷⁵ The final component of the study was a set of in-store surveys performed before and after the introduction of mandatory calorie posting in Seattle, Washington and San Francisco, California.¹⁷⁶ These surveys asked customers questions about their knowledge of calorie values in Starbucks' food and what factors were relevant in making purchasing decisions.¹⁷⁷

While this study was limited to one corporation, Starbucks, it is especially important because of the chain's large overall size.¹⁷⁸ In 2008, Starbucks ranked fourth in largest sales by a chain restaurant in the U.S.¹⁷⁹ Starbucks has over 11,000 stores and has revenues that exceed 10 billion a year.¹⁸⁰ The data set in this comprehensive study included, transaction made at all 222 locations in New York City, all 94 locations in Boston and Philadelphia, and 2.7 million individual anonymous cardholders.¹⁸¹ The

¹⁷³. *Id.*

¹⁷⁴. *Id* at 2.

¹⁷⁵ *Id.*

¹⁷⁶ . *Id.*

¹⁷⁷ . *Id.*

¹⁷⁸ . *Id* at 28.

¹⁷⁹ . http://www.rimag.com/article/372414-R_I_2009_Top_400_Restaurant_Chains.php

¹⁸⁰. *Id*

¹⁸¹ . Stanford Study, *supra* note 5.

transaction covered in Boston, Philadelphia, and New York City alone covered over 100 million transactions during the 14 month period.¹⁸²

b. Findings

The study found that mandatory calorie postings at Starbucks in New York City caused the average calories per a purchase to decrease by 6%.¹⁸³ This decrease in average calories per a transaction was almost entirely due to food purchases, which fell by an average of 14% per a transaction.¹⁸⁴ Conversely, beverage calories per a transaction did not substantially change at all.¹⁸⁵ The study also found that three quarters of this reduction was due to customers buying fewer items, whereas, one quarter of this effect was due to consumers purchasing low-calorie substitutes.¹⁸⁶

The data from the Starbuck cardholders that made purchase in New York, showed that consumers who had higher average calories per a transaction before the mandatory posting, decreased their calories per a transaction dramatically more (26%) than average reduction for all consumers (6%).¹⁸⁷ The study also looked at individual cardholders that made purchases inside and outside of New York City. These “commuters”

¹⁸² . *Id*

¹⁸³ . *Id* at 2.

¹⁸⁴ . *Id*

¹⁸⁵ . *Id*

¹⁸⁶ . *Id*

¹⁸⁷ . *Id* at 3

cardholders consistently reduced their calories per transaction when outside of New York City after being exposed to mandatory postings.¹⁸⁸

The study also looked at the effect menu labeling had on Starbucks' overall revenue. It found that Starbucks' revenue was not substantially affected by mandatory calorie posting.¹⁸⁹ Revenue actually increased by 3% at stores located within 100 meters of a Dunkin Donuts, one of Starbucks' biggest competitors.¹⁹⁰ This finding showed evidence that calorie posting may have caused some customers to prefer Starbuck over Dunkin Donuts.¹⁹¹

The results from the surveys showed that customers could not accurately predict the amount of calories in their purchases.¹⁹² Customers were consistently inaccurate in their estimations, before and after menu labeling became required.¹⁹³ Costumers tended to overestimate the amount of calories in beverages, but underestimate the calories in food.¹⁹⁴ The survey also discovered that Starbucks customers consider taste and price as more important factors than nutritional content when making purchasing decisions.¹⁹⁵

c. Analysis of Findings

¹⁸⁸. *Id* at 20-24

¹⁸⁹. *Id* at 16-18

¹⁹⁰. *Id*

¹⁹¹. *Id* at 17

¹⁹². *Id* 21-22

¹⁹³. *Id.*

¹⁹⁴. *Id* at 21

¹⁹⁵. *Id*

i. “The Learning Effect”

The results of the Stanford University study showed some support of a reduction in caloric intake by restaurant patrons because of mandatory nutritional postings. The study found that caloric postings had a “learning effect” on consumers.¹⁹⁶ The “learning effect” relies on the theory that most consumers do not know how many calories are in the food their purchases before mandatory menu labeling.¹⁹⁷ Mandatory menu labeling laws, thus, reduce the costs of learning this information by putting calorie content values in easily accessible location (menus and menu boards).¹⁹⁸

This “learning effect” would explain why customer reduced their calories per a transaction in food but not beverage transactions.¹⁹⁹ Customers overestimated the calories in beverage purchases, so they did not believe a reduction in calorie consumption was necessary for these purchase. Yet, they underestimated the calories in food purchase, so they may have been unaware of the excessive amounts of calorie that they were consuming in food. Thus, when customers learned the true caloric values of their food, they made adjustments consistent with these expectations.²⁰⁰

The results of the “commuter” cardholder transactions further support this theory. New York City “commuters” reduced their calorie consumption at locations outside the

¹⁹⁶ . *Id* at 19-23

¹⁹⁷ *Id* at 19

¹⁹⁸ . *Id*

¹⁹⁹ . *Id* at 21-23

²⁰⁰ . *Id.*

city after learning the caloric values of Starbucks products.²⁰¹ This reduction occurred even in locations where there were not nutritional postings. Therefore, these reductions in caloric intake were caused by exposure to the mandatory labeling inside New York City.

ii. The Salience Effect

The Study results also showed that this reduction was partly due to a “salience effect” on customers.²⁰² This theory relies on the belief that customers know the amount of calories that are in their purchases, but only incorporate this information in their decisions when they are reminded at the point-of-sale.²⁰³ Therefore, customers are “sensitive” to this information; they value its importance more when it is placed in front of them.²⁰⁴

Customer surveyed reported that the nutritional content was the least important factor in making their purchasing decision.²⁰⁵ Customers instead regarded, taste and price

²⁰¹. *Id* at 22

²⁰² . *Id* at 19-23

²⁰³ . *Id* at 19.

²⁰⁴ . *Id*.

²⁰⁵ . *Id* at 20.

as more important to their purchasing decisions.²⁰⁶ Therefore, customers choose to go Starbucks because of its taste and price and not its healthfulness.²⁰⁷ These results show that this reduction may have occurred, because customers become more “sensitive” to caloric information when it is made readily available to them.²⁰⁸ Customers may go to Starbucks because of its taste and price, but change their purchasing decisions when reminded about the calorie content of their food.

iii. Limitations

Despite the comprehensiveness of the data collected, the result of the Stanford University study has several limitations. One major limitation of this study is that the data collected was for only one chain, Starbucks. While Starbucks is one of largest franchise in the U.S., it may not accurately represent most franchise. Starbucks’s core business is selling beverages and not food. The type of consumers that make purchases at Starbucks may be very different from the average consumer at other large chains. The results of the survey showed Starbucks patron have preferences (taste, price and convenience) for selecting products that comport to the average chain restaurant. This similar characteristic, however, may not prove that Starbucks patrons will react similarly to calorie posting as patrons of other franchise. Franchises often specialize in certain

²⁰⁶. *Id* at 21

²⁰⁷ . *Id* at 21-22

²⁰⁸ . *Id* at 19-23

product(s) and services,²⁰⁹ and this may have an effect on consumer behavior. A customer's expectations may vary depending on the restaurant. Even the data collected by the Starbucks cardholder, may not represent the average Starbuck consumer. Thus, it may be difficult to extrapolate the results from Starbucks to other chains, whose primary business is selling food.

A second limitation is that the results do not tell whether posting nutritional information will cause reduction in dietary related disease. The study showed only a 6.6% reduction in calories per a transaction. It is doubtful that a change this small alone will have any major impact on obesity.²¹⁰ This reduction in calories also may be offset by other meals. Starbuck primary business is selling beverages, so consumers may just get full meals elsewhere to offset this reduction.

Conversely, the 6.6% reduction may underestimate the long term effect of menu labeling. As the results indicated, consumers became more sensitive to higher calorie items.²¹¹ Therefore, consumers may have greater reduction per transaction when eating out at restaurants where items have higher caloric values. Furthermore, restaurants may respond to mandatory nutritional postings by providing more low-calorie options. The results showed that Starbuck profits increased in areas near Dunkin Donuts. Other studies have shown that voluntary postings of nutritional information may increase

²⁰⁹ For example McDonald is known for fast food and hamburger, Red Lobster seafood, and Starbucks coffee

²¹⁰. *Id* at 23-24.

²¹¹. *Id* 2, 19-23.

demand for restaurants but lower it for others.²¹² Therefore, competitive forces may cause restaurants to come up with tasty, low-calorie alternatives.²¹³

V. The New Federal Menu Labeling Law

Both consumer advocates and the food service industry showed support for the new amendment to the Federal Food, Drug and Cosmetic Act.²¹⁴ For restaurants, the amendment provides a consistent national standard that is easier to adopt. For consumers, the new law provides nutritional information on menus and menu boards in many locations where no information was available.

However, some critics have already suggested that the new federal law may be significantly weaker than many of local laws it preempts.²¹⁵ The primary goal of menu labeling is to change consumer behavior. But, it is also important for the legislature to look at the costs associated with this behavior. Therefore, it is important for the FDA and Congress to look at the effects of the preempted local laws and learn from their experiences to adopt the best approach to menu labeling.

i. The Succinct Statement Regarding Daily Caloric Intake

²¹² . *Id* at 26-27.

²¹³ . *Id* at 26-27.

²¹⁴ . National Restaurant Association Says Nutrition Information Provision is Win for Consumers and Restaurants, available at <http://restaurant.org/pressroom/pressrealease/?ID=1910>

²¹⁵ . See Roberto, *supra* note 1.

The new federal menu labeling law requires restaurants to provide a succinct statement concerning the suggested daily caloric intake on menus and menu boards.²¹⁶ Research suggests that this statement may be just as important as the actual caloric values of menu items.²¹⁷ Consumers may not know the amount calories they need to consumer each day. Therefore, this statement provides contextual information about calorie values.

Studies have shown that this information has a “learning effect” on consumers; whereas, exposure to this statement keep consumers from consuming more calories later.²¹⁸ This information may also have a “salience effect” on consumers as well. If the statement is located on menus and menu board where consumers will see it every time they order, this information will constantly remind consumers of the context of caloric values. Consumer will, thus become more sensitive to calories values and use this information more effectively. Therefore, it is important that the FDA does not overlook this important provision, when making its proposals. This statement needs to be clearly visible, so that consumers are aware of this information.

ii. Marketing and Advertisements

An adverse effect of menu labeling is that many producers may increase marketing efforts of unhealthy products. Smaller portions sizes and healthier options are often adverse to the interest of many food service establishments.²¹⁹ For food

²¹⁶. H.R. 3590 §4205 (b) at 1207

²¹⁷. Christina A. Roberto et al., *Evaluating the Impact of Menu Labeling on Food Choices*, AM J. PUBLIC HEALTH (Dec. 17,2009)(Published Online), available at http://www.yaleruddcenter.org/resources/upload/docs/what/policy/ImpactMenuLabeling_AJPH_12.09.pdf

²¹⁸ . *Id*

²¹⁹. Anyone’s Guess, *supra* note 86.

manufacturers and restaurants, the actual monetary costs of food ingredients are small compared to other costs in producing food.²²⁰ Therefore, the small amounts of money consumers spend when upgrading to larger portions creates larger corporate profits.²²¹ However, providing caloric values on menu boards reveals the nutritional costs of choosing larger portions.²²² Therefore, consumers may no longer believe there is any value in upgrading to larger sizes. Additionally, the cost of adding new healthier products is higher under the new regulation. Along with the direct costs of updating menus boards, chains will have costs associated with scientific testing to uncover the nutritional values of new products.

To offset the cost of this information, many restaurants may increase marketing and advertising efforts for larger sizes and already existing unhealthy products. For example, after NLEA passages in 1990, many food producers increased promotion of unhealthy food, while promotion of healthier foods remained unchanged.²²³ These marketing efforts can offset the dietary benefits of nutritional labeling. Therefore, stronger legislation may be required to protect consumers from what is now considered “non-actionable puffery.”²²⁴

²²⁰. *Id* (these other costs include marketing overhead, labor, and distribution).

²²¹. *Id*

²²². *Id*

²²³. Roberto, *supra* note 1 at 550-551.

²²⁴ See *Fraker v. KFC Corp.*, available at 2007 WL 1296571 (S.D. Cal. 2007) (Holding that advertisements by KFC claiming that fast food could be considered part of a balanced sensible diet and that KFC uses high quality ingredients was “non-actionable puffery” because “no reasonable consumer would rely upon these statements as specific representation as to health, quality or safety”).

iii. Providing Information other than Caloric Content

Finally, it is also important for the FDA and Congress to consider whether information other than caloric values should be placed on menus or menu boards. Caloric values in food are not the only nutritional information that is important to making better dietary decision.²²⁵ Americans need to eat healthier foods and “not just eat smaller amounts of bad stuff.”²²⁶ The new amendment already requires chain restaurant to provide additional information upon request. However, it is very unlikely that most consumers will take advantage of this information.²²⁷

However, providing this information on menus and menu boards is probably not the answer either. The space on Menus and menu boards is valuable. Many menus, that include variations in sizes and orders, can make understanding calorie values alone confusing. Therefore, providing more information about other nutrients may make menu boards even more difficult to understand and prove to be ineffective

²²⁵. Reinberg, *supra* note 164.

²²⁶. Kalb, *supra* note 85. at 44

²²⁷ . Stanford Study, *supra* note 3.at 29.