DEPARTMENT OF HEALTH AND MENTAL HYGIENE
BOARD OF HEALTH

NOTICE OF ADOPTION
OF A RESOLUTION TO REPEAL AND REENACT §81.50
OF THE NEW YORK CITY HEALTH CODE

In compliance with §1043(b) of the New York City Charter (the "Charter") and pursuant to the authority granted to the Board of Health by §558 of said Charter, a notice of intention of a proposal to repeal and reenact §81.50 of the New York City Health Code (the "Health Code") was published in the City Record on October 26, 2007, and a public hearing was held on November 27, 2007. A total of 82 comments were received. At its meeting on January 22, 2008, the Board of Health adopted the following resolution.

Statutory Authority

This amendment to the Health Code is pursuant to §558 and 1043 of the New York City Charter (the "Charter"). Section 558(b) and (c) of the Charter empowers the Board of Health to amend the New York City Health Code (the "Health Code") and to include in the Health Code all matters to which the authority of the Department of Health and Mental Hygiene (the "Department" or "DOHMH") extends. Section 1043 grants the Department rule-making authority. The amendment is also pursuant to the Department's historic power to regulate restaurants and food safety in New York City, which was preserved by Congress when it enacted 21 U.S.C. §343(q) and 343-1.

STATEMENT OF BASIS AND PURPOSE

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I. Background

Regulation of food service establishments is a core public health function. The Health Department enforces provisions of the Health Code, the State Sanitary Code, Public Health Law and other applicable laws relating to food served directly to consumers throughout the City. This includes regulation of food that is commercially prepared and sold by food service establishments, a broad category which includes restaurants.

Restaurants (the term is being used interchangeably with "food service establishments" or "FSEs") are an important source of food for New York City residents: an estimated one third of daily

caloric intake comes from foods purchased and prepared outside of the home, and this proportion is increasing.[1] Assuring safe and healthy dining options is a public health priority. The Department issues permits to and inspects all New York City FSEs, as defined in §81.03(j) and (p) of the Health Code.

The Department is charged with preventing and controlling disease, including chronic diseases. Obesity is epidemic in the United States and in New York City, and is an important risk factor for many chronic diseases including heart disease, stroke, diabetes, cancer, and asthma. Federally mandated nutrition labeling on standardized food products for sale in supermarkets facilitates informed choice: nearly three quarters of consumers report that they look at calorie information on the Nutrition Facts Panel, and about half indicate that nutrition information affects their food choices.[2,3] However, consumers lack easily accessible information to make informed choices when eating in restaurants. Calorie information provided at the time of food selection in FSEs would enable New Yorkers to make more informed, healthier choices and can reasonably be expected to reduce obesity and the many related health problems which obesity causes.

On December 5, 2006, the Board of Health adopted a resolution amending Article 81 of the Health Code by adding a new §81.50. The regulation was to become effective on July 1, 2007 and mandated that any FSE that made calorie information publicly available on or after March 1, 2007 post such information on its menus and menu boards. The provision was challenged in a lawsuit brought by the New York State Restaurant Association. On September 11, 2007, a federal judge in the United States District Court for the Southern District of New York held that Health Code §81.50 as adopted was preempted by 21 U.S.C §343(r) because, to the extent it applied only to restaurants which had voluntarily provided calorie information, it regulated nutrient content claims and was therefore preempted by §343(r).[4]

Although §81.50 was found to be preempted because of the specific way it was written, the Federal court clearly affirmed the authority of local governments to mandate that restaurants disclose nutritional information:

> The majority of state or local regulations—those that simply require restaurants to provide nutrition information—therefore are not preempted. Such regulations impose a blanket mandatory duty on all restaurants meeting a standard definition such as operating ten or more restaurants under the same name….There is no voluntary aspect to such a disclosure requirement and no basis for arguing that the mandated disclosures are more properly considered the regulation of voluntary claims subject to [21 USC] § 343 (r). *New York State Restaurant Association v. New York City Board of Health, et al.*, 07 Civ. 5710 (RJH), USDC SDNY, 9/11/07.

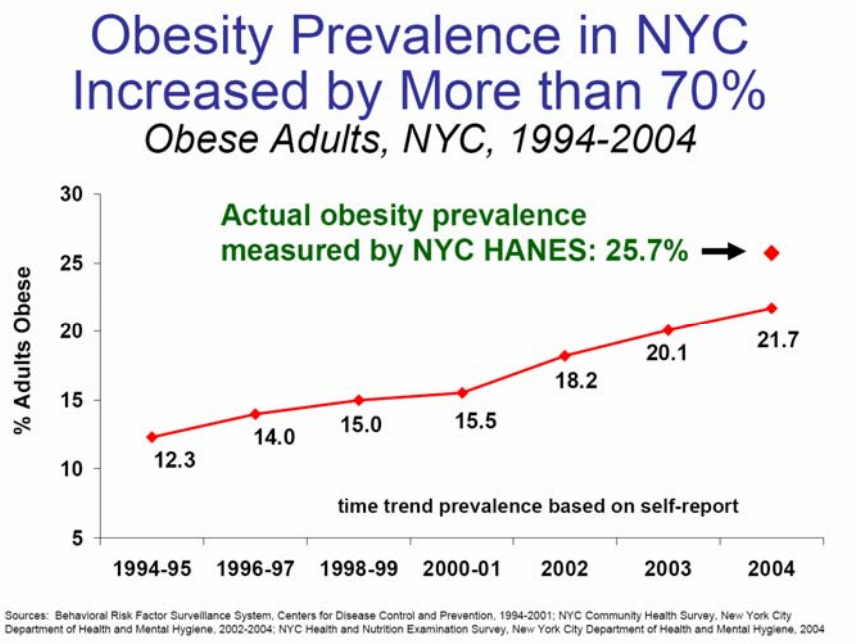
The Department proposed that the Board of Health repeal Health Code §81.50 and reenact a new §81.50, and notes that the Department has clear authority consistent with 21 U.S.C. §343(q) to mandate that restaurants disclose nutritional information. The new §81.50 requires that information on calorie content values of menu items be clearly visible to patrons of FSEs at the time of ordering for menu items that are served in portions, the size and content of which are standardized, at food service establishments in the City of New York which are one of a group of fifteen or more food service establishments doing business nationally under the same name, and offering for sale substantially the same menu items.

II. Obesity is epidemic and is a serious and increasing cause of disease

An obesity epidemic currently undermines the health of many Americans in general and New Yorkers specifically. According to measured height and weight data from the National Health and Nutrition Examination Survey (NHANES), the proportion of U.S. adults who are obese more than

doubled over the past three decades. While 14.5% of Americans were obese in 1971-1974, the proportion rose to 32.2% by 2003-2004.[5]

In New York City, obesity prevalence has increased by more than 70% in the past decade. More than half (54%) of New York City adults are overweight or obese, and 1 in every 5 adults is obese;[6] 43% of elementary school children are overweight or obese.[7]



Obesity is a risk factor for heart disease, stroke, cancer and diabetes – 4 of the 5 leading causes of death in New York City in 2005, with 40,771 deaths (more than 70% of all deaths).[8] These conditions cause enormous and preventable human suffering and use more of society's resources than even the most prevalent communicable diseases. In fact, obesity, and, with it, diabetes, are the only widespread health problems in this country and in this City that are getting worse – and getting worse rapidly.

To illustrate just one aspect of obesity's toll, diabetes has more that doubled in New York City in the past decade, and hospitalizations for long-term complications of diabetes have been rising steadily. In 2004, there were 4,865 people on dialysis or receiving kidney transplants in New York City due to diabetes.[9] There were 3,040 lower extremity amputations in 2005 due to diabetes.[10] We estimate that approximately 9,000 New Yorkers have been blinded by diabetes,[11] and that more than 100,000 New Yorkers have eye damage from diabetes.[12] This burden of preventable diabetes complications is not evenly distributed across New York City residents: African-Americans, Latinos and the poor are disproportionately affected.

III. <u>The obesity epidemic is mainly due to excess calorie consumption – often away from home</u>

Weight gain occurs when more calories are consumed than are expended. Small calorie excesses over time have a cumulative effect. Eating out, and eating extra calories while eating out, contributes disproportionately to the excess calorie intake that fuels the obesity epidemic.[13,14]

Today more people eat out, and they eat out more often. In 1970, Americans spent 26% of their food dollars on foods prepared outside their homes; by 2006 they spent almost half (48%).[15] At present, one third of total calorie consumption is outside the home.[16] A large, representative national survey (the Continuing Survey of Food Intake by Individuals) conducted over two decades, from 1977 to 1996, shows that calorie intake from restaurant/fast food doubled as a percentage of energy intake for

Americans over the age of 2.[17] Further, while eating out at restaurants, diners typically eat more than at home. In the same national survey, adult men who ate food away from home during the previous 24-hour period weighed 1 kg more than men of the same height who did not.[18] Children eat almost twice (1.8 times) as many calories when eating out as compared to eating at home.[19] In a cross-sectional study of boys and girls in three age groups, those aged 12-19 years who consumed foods away from home were more likely to have a higher Body Mass Index (BMI) percentile.[20] In sum, this increase in calories, often consumed away from home, translates to an increase in body weight in both adults and children.[21,22, 23, 24, 25]

The increase in consumption of away-from-home foods has been facilitated by the expansion of restaurant chains, which serve food that is easily available, inexpensive, and high in calories. Nationally, restaurant chains – both fast food and casual dining chains – comprise a growing share of customer traffic.[26] Between 2005 and 2009, the number of fast food establishments is projected to increase from 266,300 to 287,437 establishments.[27]

Further, over time fast food and other chain restaurant food has been served in increasingly large portion sizes, an increase that parallels the obesity epidemic.[28] For example, since the 1970s, the typical serving size for soft drinks increased by 49 calories, for French fries by 68 calories, and for hamburgers by 97 calories.[29] Although these portion sizes are now considered "normal" by consumers, a single meal may have far more than a single meal's appropriate share of the total recommended daily calorie allowance.

To obtain more information about patterns of food consumption in New York City restaurant chains affected by the December 2006 Health Code amendment, the Department conducted a large survey in a representative sample of major restaurant chains in New York City. The survey, conducted in March through June 2007, collected information from 11,835 diners at a random sample of 275 restaurants, representing 13 restaurant chains. As patrons left the restaurant, they were asked to supply their restaurant receipt and to answer several brief questions, including details of the purchase not reported on the receipt, whether the purchase was only for themselves, whether they saw or used any available calorie information, and if so, whether this affected their purchase.

Using the receipts along with published calorie information, the Department was able to examine several issues, including the calorie content of food and beverage selections. For the 7,308 patrons who purchased one or more items, for themselves only, at one of 11 major restaurant chains surveyed on a weekday between 12 noon and 2 PM – a total of 168 locations across the five boroughs – the average calorie purchase was 824 calories (preliminary data). About one third (33.2%) of patrons purchased more than 1,000 calories; 8.7%, more than 1,400 calories. For reference, a woman over 25 years of age with average (i.e. little) physical activity is advised to consume 1,800 calories per day.

IV. Chain restaurants serve food that is associated with excess calorie consumption and weight gain

While eating at restaurants away from home in general is associated with increased calorie intake, most research has focused on fast food. About 90% of restaurant chains in New York City serve fast food. There are abundant data to show that people who eat at fast food establishments consume more calories. Two important analyses draw on the Continuing Surveys of Food Intakes conducted in the mid 1990's. The first, a 1994-1996 survey of 17,370 adults and children, found that adults who ate at fast food restaurants consumed 205 more calories per day than those who did not, and children ate 155 more calories. [30] In the second survey of more than 9,000 adults, mean energy intake on days when fast food was consumed was 206 calories higher than on other days.[31] This increase in calories would result in a three pound weight gain each year if a consumer were to eat fast food only once each week. In the second survey, fast food contributed more than one third of consumers' daily calorie intake.[32] Similarly, in a study of nearly 900 women, called Pound of Prevention, increased frequency of eating at fast food

restaurants was associated with higher total energy intake.[33] This association has also been shown among adolescents and children. A study of 4,746 students age 11-18 years found that regular fast food consumption was associated with 800 extra calories per week in boys and 660 extra calories per week in girls.[34] Such a calorie excess could translate into a weight gain of 10 pounds or more per year. An increase of 129 calories per day among high versus low frequency consumers of fast food was also reported in a large national cohort of adolescent girls.[35]

Many studies document that increased calorie intake observed with consumption of fast food results in weight gain.[36] In a study of over 9,000 adults, eating fast food increased the prevalence of overweight by 27-31%;[37] among 3,394 adults in the Coronary Artery Risk Development in Young Adults Study (CARDIA), fast food eating was positively associated with BMI, and higher levels of fast food consumption correlated with a higher BMI. This same association has been found in different contexts, for example among Mexican children in San Diego, where 4-7-year-old children were twice as likely to be obese if they ate in fast food restaurants,[38] and among Minnesota secondary school students.[39] Follow up studies further strengthen the evidence for a causal association between easting fast food and weight gain. In a study of 3,031 adults (part of CARDIA) who were followed up for 15 years, baseline fast food intake was directly associated with increases in body weight.[40] Similarly, in a study of almost 10,000 adolescents, more days of fast food consumption at baseline predicted increases in BMI at 5 year follow-up.[41]

Some studies specifically examine other settings and support the conclusion that sit-down chains, and not only fast food chains, serve food associated with increased caloric intake and weight gain. One study compared food selections made by adolescents who were asked to order a dinner meal from both sit-down chain restaurants and fast food restaurants. Meals selected at Chili's, Denny's and Outback Steakhouse had even higher calorie content than at comparison restaurants McDonald's and Taco Bell.[42]

V. <u>Calories in restaurant foods: distorted consumer perceptions and a misleading information gap lead to unhealthy food choices</u>

Consumers neither know nor estimate accurately the calorie content of food purchased in restaurants. Furthermore, guesses typically underestimate calories. A recent poll asked 523 adults to identify which of the four breakfast choices from Denny's Restaurants had the fewest calories and which of the four menu items from McDonald's had the most calories. Only 11% gave correct answers. Respondents were more likely to guess that Denny's French toast and syrup (1,003 calories) had fewer calories than fried steak and eggs (464 calories).[43] Similarly, a recent study found that 9 out of 10 people underestimated the calorie content of less-healthy items, and did so by an average of more than 600 calories (almost 50% lower than the actual calorie content).[44] This is consistent with the other findings that consumers underestimate calories and overestimate the healthfulness of restaurant items.[45,46,47]

Even experienced nutrition professionals have difficulty accurately estimating the calorie content of restaurant food. In one study, these professionals underestimated calories in restaurant food by 200 to 600 calories.[48] For example, dietitians estimated on average that a typical diner hamburger with onion rings meal had 865 calories, when it actually had 1,550 calories. If even experienced professionals in the field of nutrition underestimate the calorie content of restaurant foods, consumers are even more likely to underestimate caloric content of menu choices. Without calorie information, it is difficult for consumers to compare options and make informed decisions.

The systematic underestimation of calories suggests that consumers have distorted perceptions of calorie content and *de facto* have been misled to view oversized, high-calorie portions as "normal" portions, containing acceptable numbers of calories. For example, a breakfast meal at MacDonald's offers the selection of a "Big Breakfast" (790 calories) or a "Deluxe Breakfast" (1,140 calories). In the absence of calorie information, how would a consumer know that a "Big Breakfast" contains slightly over half the

calories of a "Deluxe Breakfast"? Or that a Deluxe Breakfast, when served with butter and syrup, as pictured and provided at no extra charge, comes to 1,400 calories. Add a large orange juice (250 calories) and breakfast comes to 1,650 total calories.[49] For most New Yorkers, this breakfast is close to their recommended calorie intake for the entire day.

Differences in calories among various options are not always intuitively obvious, and a far lower calorie option is often available within a group of similar products. For example, calories in cheeseburgers at Burger King vary more than three-fold, not even counting the fries and drinks: Cheeseburger-330 calories, Whopper Junior with cheese- 410 calories, Double Whopper with cheese- 990 calories, or a Triple Whopper with cheese-1,230 calories. The price differential for increasing a portion size often does not correlate with the resulting calorie difference. A McDonald's $1.79 order of medium fries has 380 calories; an 11% price increase to a $1.99 order of large fries is a 50% calorie increase. Increasing the serving size of a healthy-sounding Starbuck's Green Tea Frappuccino from its small $3.75 version to the 32% more expensive large version results in a 76% increase in calories, from 370 to 650 calories.

There is a calorie information gap. This gap is contributing to people choosing higher calorie items and to the obesity epidemic. Providing information about the calorie content of foods and beverages being served in chain restaurants in a time, place, and manner that can inform decisions will help bridge this gap. Provision of calorie information on menu and menu boards is an important way to accomplish this goal.

Children are particularly vulnerable to the promotion of fast foods, and have been specifically targeted for such promotion by restaurant chains[50]. The major chains use marketing strategies directly aimed at children;[51] children who view such television advertisements are about 50% more likely to eat fast food,[52] and to eat the brand that is most popular.[53] Given the epidemic of childhood obesity, it is reasonable to conclude that providing calorie information at these chains can help parents make more informed choices for their children, who lack the knowledge and experience to understand how promotional strategies affect their preferences.

Other marketing practices mislead consumers to unhealthy choices by using images to suggest healthfulness[54]; by building the impression that oversized dishes constitute "normal" meals; and by pricing policies which increase price only slightly while vastly increasing portion sizes.[55] This latter practice may contribute to the observation that fast food is consumed disproportionately by the poor.[56]

VI. <u>Point-of-decision calorie information helps consumers make informed, healthier food choices</u>

Consumers notice and use nutrition information when it is made available at the point of purchase. Since 1994, the federal Nutrition Labeling and Education Act (NLEA) has made nutrition information available to consumers on packaged foods purchased in retail stores. Three quarters of American adults report using food labels,[57] and about half (48%) report that nutrition information on food labels has caused them to change their food purchasing habits.[58] The calorie section is both the most prominent, and the most frequently consulted part of the Nutrition Facts Panel on packaged foods, with 73% of consumers reporting that they look at calorie information on the Nutrition Facts Panel.[59]

Food served in restaurants is not subject to federal nutrition labeling requirements. With nutrition information, consumers are 24%-37% less likely to select high-calorie items.[60] In the previously mentioned DOHMH interview and receipt study, the Department was able to examine the impact of point of purchase calorie information at Subway sites, New York City's second largest chain with 315 locations. At the time of the study, undertaken before §81.50 became effective, Subway posted nutritional information for some of its products on a sticker placed on a display case near the cash register – a manner far less prominent than that mandated by §81.50. Nevertheless, among the 1,816 Subway patrons

sampled at 47 randomly selected Subway locations, nearly one third (30.8%) reported seeing calorie information (preliminary data). Patrons who saw calorie information purchased items containing 48 fewer calories than those who did not see this information.[61] Furthermore, patrons who said calorie information had affected their selection were correct – they chose items with 92 fewer calories. That their report matched the data from their receipts that documented lower-calorie choices is consistent with findings that when consumers say they will change choices based on calorie information, they often actually do so.

Based on the best estimates, if the reduction in calories in covered FSEs were similar to what occurred at Subway, over the next five years at least 150,000 fewer New Yorkers would be obese, resulting, among many other health benefits, in at least 30,000 fewer cases of diabetes, and possibly many more than that.

Point-of-decision prompts have proved effective in promoting other healthy activities. For example, signs placed near elevators or escalators to encourage people to "take the stairs" increase stair usage by approximately 54%.[62]

Prominent posting of calorie information will make the calorie content of foods served in these settings much more apparent. Because of this, it is reasonable to anticipate that some restaurant chains will improve menu offerings to lower their caloric content. Starbucks, for example, which began providing calorie information, reformulated some of its baked goods with slightly reduced sizes and hence fewer calories. Analogously, in anticipation of, and following the effective date of the FDA's requirement for trans fat content on the Nutrition Facts Panel in 2006, manufacturers reformulated their products to contain less trans fat.[63]

To change the trajectory of the obesity epidemic, which has been relentlessly upward for more than two decades, requires small, permanent calorie reductions across the population. If, as can reasonably be suggested, patrons of these establishments reduce their caloric intake by even 5-10% after seeing calorie information, there would be substantial reductions in obesity, diabetes, and obesity- and diabetes-related illnesses as a result of this measure.

VII. Voluntary activities by restaurants to supply calorie information fall woefully short

Some restaurants voluntarily provide nutrition information to their patrons, but most of these efforts have failed to inform the vast majority of consumers. Patrons at the 13 major chains sampled in the interview and receipt study mentioned above were asked whether they a) saw and b) used calorie information while in the restaurant in the period before §81.50 was in effect. Taking a weighted average and excluding Subway, only 3.1% of customers (1 in 32) – reported seeing calorie information (Table 1).

Table 1. Percent of consumers who reported seeing calorie information at certain New York City food service establishments covered under the previous Health Code §81.50, May-June 2007, preliminary data

Brand	# of Sites	# of Customers Interviewed*	% of Customers who Reported Seeing Calorie Information in the Restaurant
Dominos	10	57	0.0%
Papa Johns	5	222	0.0%
Popeyes	7	512	0.6%
Dunkin Donuts	70	2,756	1.3%
Starbucks	37	1,285	2.7%
Au Bon Pain	2	166	3.7%

Burger King	20	1,033	3.8%
Yum Brands (Taco Bell, KFC, Pizza Hut)	21	861	4.6%
McDonald's	45	2,593	4.7%
Wendy's	11	474	6.9%
Subway	48	1,906	31.3%

** Survey customer totals vary slightly due to exclusion of customers with missing data for calorie analyses.*

These restaurants' activities to make calorie information available to their patrons are woefully inadequate. Although a company such as McDonald's purports to have conducted extensive social science research in order to provide accessible, consumer-friendly nutrition information,[64] this information was not noticed by 95% of New York City survey participants – even *after* they had purchased their food – and, therefore, can have little or no impact on choice. The reasons for such dismal results are not hard to identify. The information is usually not displayed where and when consumers make their purchases. Instead it is found in brochures, on placemats covered with food items, or on food wrappers, where the information is hard to find, difficult to read, and only accessible after the purchase is made. Patrons have to ask for information or search for it in advance on the internet. Furthermore, each food service establishment uses different formats, making it cumbersome to find. As a means to help patrons make informed and healthier choices, almost all present voluntary displays of nutrition information fail.

VIII. <u>Leading health authorities recommend posting of calorie information</u>

Calories are recognized as the single most important element of nutrition information to address the obesity epidemic. The Food and Drug Administration's Obesity Working Group (OWG) concluded its 2005 work with a report entitled "Calories Count" whose executive summary stated:

> "The OWG's recommendations are centered on the scientific fact that weight control is primarily a function of balance of the calories eaten and calories expended on physical and metabolic activity….The recommendations contained in this report therefore focus on a "calories count" emphasis for FDA actions….OWG Principal Recommended Action Items….
>
> Calories: Issue an advance notice of proposed rulemaking (ANPRM) to solicit public comment on how to give more prominence to calories on the food label. As examples, increasing the font size for calories, including a percent Daily Value (%DV) column for total calories, and eliminating the listing for calories from fat."[65]

While calories are just one component of nutritional choice, they are a critically important component. Unburned calories are stored as fat, regardless of whether the calories come from fats, carbohydrates or proteins. Studies of dietary intake in the United States have found that people are eating more calories, in contrast to most other aspects of dietary intake, which have improved.[66] Average calorie intake for Americans over age 2 increased by nearly 200 calories per day, from 1,791 to 1,985 calories, between 1977 and 1996. Restaurants and fast food were the fastest growing source of calories in this period.[67]

Leading health organizations and experts recognize that the calorie information gap contributes to food choices, with serious health consequences, and should be addressed to promote healthy food choices.[68] The Institute of Medicine found that existing efforts fall far short of providing information in a simple accessible format.[69] A Food and Drug Administration-sponsored expert group made its leading recommendation for away-from-home foods as follows:

> "Away-from-home food establishments should provide consumers with calorie information in a standard format that is easily accessible and easy to use. Participants believe that information should be provided in a manner that is easy for consumers to see and use as part of their purchasing and eating decisions. Information should be provided for any standard menu item offered on a regular and ongoing basis that is prepared from a standardized recipe, whether the item is an entire meal or a meal component. Non-standard items, including daily specials and experimental items, may be exempted. Information should be provided for the standard menu item as usually offered for sale (i.e., the base product, in the portion size as offered for sale), since most means of providing information cannot easily account for changes due to customization and special orders."[70]

During the public comment period for §81.50, the support received from organizations of health professionals was overwhelming. Organizations that submitted statements supporting the proposed resolution included the: American Medical Association, American Diabetes Association, American Cancer Society, National Hispanic Medical Association, New York Academy of Medicine, Medical Society of the State of New York, and a wide range of prominent New York medical and community institutions. Consumers also support such measures: six nationally representative polls showed most consumers (62-87%) support requiring restaurants to list nutrition information.[71, 72]

IX. Mandating calorie information for restaurant chains is feasible, will reach many consumers, and can be reasonably expected to have a health impact

Subway, the only store that had posted calorie information at the point-of-purchase at the time of the Health Department's study, subsequently posted its calorie information in compliance with Health Code §81.50, making it much more prominent and demonstrating the feasibility of implementing this rule. See Figure 1. By putting calorie information where almost all consumers will look to make their selection – the menu board, menu or item tags – viewing this important nutrition information will become the public's default dining experience. No extra step or search will be required. Making a preferred behavior the default is a core public health strategy.[73]

Figure 1. Subway Menu Boards in Manhattan on July 2, 2007

Chain FSEs represent an appropriate focus for regulation for three reasons. First, restaurant chains use highly standardized menu items and can readily measure or estimate accurate calorie counts. Second, these major chains represent a substantial and disproportionate share of restaurant meals. While restaurant chains make up approximately 10% of NYC's 23,000 restaurants, they account for a much larger proportion of restaurant *meals* than suggested by their number (i.e., far more than 10% of meals).[74] Data from The NPD Group, a major market research company, indicate that, in 2007, major chain restaurants in the NYC metropolitan area accounted for more than one third of all restaurant traffic – 34.7%[75] – more than 3-fold their representation among food service establishments overall. In fact, we estimate that this regulation has the potential to affect consumer choices involving at least 145 million meals in New York City per year, and possibly as many as 500 million or more.[76] And third, as outlined above, chain restaurants typically serve food that is clearly and disproportionately associated with obesity.

X. <u>Changes to Health Code to require posting of calorie information</u>

Providing calorie information is a public heath intervention to help address the rapidly growing twin epidemics of obesity and diabetes. Providing clear and comprehensible point-of-purchase calorie information allows consumers to make more informed and healthier food choices in restaurants.

Accordingly, Health Code §81.50 has been repealed and reenacted to require that information on calorie content values of menu items be available to patrons of FSEs at the point-of-decision for all menu items that are served in standardized portions. The food service establishments covered by this provision would be any establishment in the City of New York that is one of a group of 15 or more food service establishments doing business nationally under the same name and offering for sale substantially the same menu items, regardless of whether such food service establishments are owned and operated by the same entity. Fifteen was found to be an appropriate cut-off to focus on chains with standardized menus, and will cover the vast majority of such chain restaurant locations.

This Health Code amendment will cover approximately 2,400 restaurants (10% of all FSEs). Clear and conspicuous posting of calorie information would be required on all menu boards and menus, as well as on food item display tags, adjacent or in close proximity, to the menu item, using a font and format that is at least as prominent in size as that used to post either the name or price of the menu item. This provision requires covered FSEs to make such information available to their customers in plain sight at the point-of-decision.

The prior version of §81.50 that is being repealed required that calorie information be included next to the listing of each menu item, and that calorie content values be posted in a size and typeface at least as large as the name or price of the menu item (and for menu boards, whichever size was larger). It also included an option for FSEs to propose alternative designs for making information available to patrons, but these alternative designs had to be at least as prominent as the means set forth in the Rule. The reenacted rule instead provides one, more flexible standard for displaying calorie information, incorporating the lessons learned by the Department from its analysis of many proposed alternative designs and its discussions with industry representatives. All of the alternative design elements that were considered approvable have been incorporated into the reenacted rule. Calorie information will have to be displayed as prominently as either the menu item's name or price, but not whichever is larger as was required by the former §81.50. Calorie information can be clearly associated with, rather than adjacent to, the menu item name or price, on the menu board or menu. Calorie information will also be provided on item tags where food is displayed. Information on item tags can substitute the use of ranges on the menu board where applicable. And, the current version allows for separate displays of calorie content information at drive-through windows. Because some of the alternative designs reviewed by the Department used font and background colors with poor contrast, however, a "format" requirement is being added to the equal prominence standard to ensure that calorie information can be easily read.

Under the prior rule, menu items for which calorie information was typically not made available, such as combination meals, would not have been covered. Because application of the reenacted rule will not be based on the prior provision of calorie information, calorie information for all menu items, including combination meals, will now be required to be posted.

In light of queries received about the definition of a menu, specific definitions of menus and menu boards were added.

This rule mandates posting only of calories, the single most important piece of nutrition information, at the point of selection. FSEs are, of course, not be precluded from providing additional nutrition information voluntarily. FSEs are also free to add disclaimers about possible slight variations from listed calorie content.

The Department's restaurant inspectors will be responsible for enforcing the requirement that nutrition information is provided on menu boards and menus.

In summary, the reenacted Health Code §81.50 is an important part of an integrated public response to the epidemic of obesity – the only condition of widespread public health importance in this country and this city that is getting worse, and getting worse rapidly. The restaurants covered by this calorie information regulation provide a large and increasing proportion of food consumed by New Yorkers, and consumption of high-calorie food in these establishments increases the risk of obesity, and with it, diabetes, heart disease, stroke, asthma, and cancer. Calories are by far the single most important piece of nutritional information, and currently this information is not accessible to consumers, who are unaware of and generally underestimate caloric content. There are consensus recommendations, broad evidence, and widespread scientific support for the rationale and soundness of this measure and its impact on health.

The measure is a narrowly tailored minimum requirement that has already been proven feasible to implement and does not in any way restrict communication of additional nutritional information. The rule focuses on chain restaurants, where the measure can be readily and accurately implemented, which account for a large and disproportionate proportion of meals served, and which serve food whose consumption has been clearly associated with excessive calorie intake and with obesity.

XI. Response to public comments

The Department received a total of 82 individual oral and written comments on the notice of intention: 65 were in favor, 13 were opposed and four were neither in support nor opposed.

In response to comments about certain menu items, such as salads where consumers choose from a range of standardized ingredients to create a fully customized offering, and where ingredients are posted on the menu, calorie information could be presented in one of two ways. It might be provided separately for each standardized ingredient. Alternatively, consistent with section 81.50 (c)(4)(i) of the rule, a range of calorie content information could be provided for a variety of ingredients, whether differentiated by type of ingredients or price.

STATEMENT PURSUANT TO SECTION 1042 – REGULATORY AGENDA

The amendment was not included in the Department's Regulatory Agenda because it follows a recent court ruling.

The PROPOSAL is as follows:

Note-matter in brackets [ ] to be deleted

Matter underlined is new

RESOLVED, that §81.50 of the New York City Health Code, set forth in Title 24 of the Rules of the City of New York, as adopted by resolution on the fifth of December, two thousand six, be hereby repealed and reenacted, to be printed with explanatory notes, as follows:

§81.50 Posting of calorie information.

(a) *Definitions and construction of words and terms used in this section*.

(1) *Covered food service establishment* shall mean a food service establishment within the City of New York that is one of a group of 15 or more food service establishments doing business nationally, offering for sale substantially the same menu items, in servings that are standardized for portion size and content, that operate under common ownership or control, or as franchised outlets of a parent business, or do business under the same name.

(2) *Menu* shall mean a printed list or pictorial display of a food item or items, and their price(s), that are available for sale from a covered food service establishment and shall include menus distributed or provided outside of the establishment.

(3) *Menu board* shall mean any list or pictorial display of a food item or items and their price(s) posted in and visible within a covered food service establishment or outside of a covered food service establishment for the purpose of ordering from a drive-through window.

(4) *Menu item* shall mean any individual food item, or combination of food items, listed or displayed on a menu board or menu that is/are sold by a covered food service establishment.

(5) *Food item tag* shall mean a label or tag that identifies any food item displayed for sale at a covered food service establishment.

(b) *Scope and applicability.* This section shall apply to menu items that are served in portions the size and content of which are standardized at a covered food service establishment. This section shall not apply to menu items that are listed on a menu or menu board for less than 30 days in a calendar year.

(c) *Posting calorie information for menu items.* All menu boards and menus in any covered food service establishment shall bear the total number of calories derived from any source for each menu item they list. Such information shall be listed clearly and conspicuously, adjacent or in close proximity such as to be clearly associated with the menu item, using a font and format that is at least as prominent, in size and appearance, as that used to post either the name or price of the menu item.

(1) *Calculating calories.* Calorie content values (in kcal) required by this section shall be based upon a verifiable analysis of the menu item, which may include the use of nutrient databases, laboratory testing, or other reliable methods of analysis, and shall be rounded to the nearest ten (10) calories for calorie content values above 50 calories and to the nearest five (5) calories for calorie content values 50 calories and below.

(2) *Food item tags.* When a food item is displayed for sale with a food item tag, such food item tag shall include the calorie content value for that food item in a font size and format at least as prominent as the font size of the name of the food item.

(3) *Drive-through windows.* Calorie content values at drive-through windows shall be displayed on either the drive through menu board, or on an adjacent stanchion visible at or prior to the point of ordering, so long as the calorie content values are as clearly and conspicuously posted on the stanchion adjacent to their respective menu item names, as the price or menu item is on the drive through menu board.

(4) *Range of calorie content values for different flavors, varieties and combinations.*

(i) *Different flavors and varieties.* For menu items offered in different flavors and varieties, including, but not limited to, beverages, ice cream, pizza, and doughnuts, the range of calorie content values showing the minimum to maximum numbers of calories for all flavors and varieties of that item shall be listed on menu boards and menus for each size offered for sale, provided however that the range need not be displayed if calorie content information is included on the food item tag identifying each flavor or variety of the food item displayed for sale, in accordance with paragraph (2) of this subdivision.

(ii) *Combinations.* For combinations of different food items listed or pictured as a single menu item, the range of calorie content values showing the minimum to maximum numbers of calories for all

combinations of that menu item shall be listed on menu boards and menus. If there is only one possible calorie total for the combination, then that total shall be listed on menu boards and menus.

(d) *Effective date.* This section shall take effect on March 31, 2008.

(e) *Severability*. If any provision of this section, or its application to any person or circumstance, is held invalid by any court of competent jurisdiction, the remaining provisions or the application of the section to other persons or circumstances shall not be affected.

Notes: Section 81.50 was added by resolution adopted on January 22, 2008, to require that covered food service establishments in New York City display at point of purchase information about the calorie content value of items on menu boards and menus in an effort to increase patrons' access to necessary information to facilitate informed nutritional choices at time of purchase, and thereby reduce the risk of obesity and obesity-related diseases and conditions. This section does not preclude any food service establishment, including covered food service establishments, from voluntarily providing additional nutritional information, nor from providing a disclaimer stating that there may be variations in calorie content values across servings based on slight variations in serving size, quantity of ingredients, or special ordering.

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