

§ 81.50 Calorie Posting Response to Comments



Lynn Silver, MD, MPH

Assistant Commissioner, Bureau of Chronic Disease Prevention and Control

Cathy Nonas, MS, RD

Director, Physical Activity and Nutrition Program

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§81.50 Proceedings to Date

Dec 5 2006	§81.50 Approved First adopted regulation for calorie posting on menus in US
June 2007	Lawsuit Filed NYRSA vs. NYCDOHMH
July 1 2007	§81.50 Effective
Sept 11 2007	Judicial Decision
Oct 24 2007	Existing §81.50 Repealed Modified §81.50 approved for public comment
Nov 27 2007	Public Hearing on §81.50
Jan 22 2008	<i>Board of Health Vote on §81.50</i>
Mar 31 2008	<i>§81.50 Proposed Effective Date</i>

Summary of Comments and Testimony

- 82 written comments
- 18 public hearing participants
- Majority of comments in favor
 - 65 in support
 - 13 in opposition
 - 4 no viewpoint

Leading Health Organizations in Support of §81.50

- American Cancer Society
- American Diabetes Association
- American Academy of Pediatrics
- American Medical Association
- American Heart Association



National, State and Regional Health Organizations in Support of §81.50

- Center for Science in the Public Interest
- Citizen's Committee for Children
- New York Healthy Eating and Physical Activity Alliance
- NYS District of the American Academy of Pediatrics (AAP)
- Rudd Center for Food Policy, Yale University
- Institute for Human Nutrition, Columbia University
- Public Health Association of New York City
- New York City Nutrition Education Network

Scientists and Authors in Support of §81.50

- David Ludwig, Harvard, Boston Children's Hospital
- Kyah Duffey, University of North Carolina
- Marie St. Onge, Obesity Research Center
- Xavier Pi-Sunyer, St. Luke's Hospital
- Eric Schlosser, Fast Food Nation book
- Lisa Young, PhD, Portion Teller book
- Wahida Karmally, PhD, Columbia Presbyterian

Organizations in Opposition

- National Restaurant Association
- International Franchise Association
- Wendy's
- Domino's Pizza
- Hale & Hearty
- Center for Consumer Freedom
- Auntie Anne's
- Darden Restaurants
- Carvel Ice Cream

Concerns Raised in Public Comments and Testimony

- 1. Health Impact**
- 2. Feasibility**
- 3. Regulatory Strategy**

1. Health Impact

- Effectiveness and justification for only regulating chain restaurants
- Evidence of effectiveness of posted information
- Rationale for mandating listing of calories only
- Need for more intensive nutrition education

Effectiveness & justification for regulating only chain restaurants

Comment:

- Unfair to chains
- Restricts scope of intended benefit
 - Center for Consumer Freedom calculated covered restaurants would amount to only 3% of calorie consumption

Effectiveness & justification for only regulating chain restaurants

Response:

- Chains serve a major share of NYC meals
 - major NYC chain restaurants ~ 35% of traffic
- Chains serve food linked to excess caloric intake and weight gain
- Chains can reliably provide calorie information
 - Procurement and food preparation highly standardized
- Consistent with Judge Holwell's decision

Effectiveness of posted information

Comment:

- Calorie information will confuse, not educate

Response:

- Calorie posting can be effective in two ways:
 - Informed consumers choose healthier items

And

- Restaurants increase healthier menu options and reduce portion sizes
 - Increase in consumer demand
 - Greater awareness of calorie content

Effectiveness of posted information

Response:

- Existing industry approaches to convey calorie information are not effective
 - Other than at Subway, less than 5% of consumers saw calorie information
 - At Subway sites 30% of patrons saw the calorie information
 - At Subway, those who saw calorie information, ate 48-92 fewer calories (*preliminary data*)

Effectiveness of posted information

Response:

- FDA recommends such calorie information
 - FDA's Obesity Working Group recommended a nationwide, voluntary, point-of-sale nutritional information campaign for restaurant consumers
 - FDA focus group participants were in favor of having calories listed after meal items and after combo meals on menu boards

Effectiveness of posted information

Also in support:

- National Academy of Medicine; Surgeon General, and the 2007 President's Cancer Panel

And..

- *“the menu board is the single most valued piece of real estate in a Burger King restaurant. It is the most important way we communicate with our customers in the store about the products we offer and their price. It is what the customers look at, and it is what stimulate their decision to buy.”* Hector Munoz of Burger King

Effectiveness of posted information

Comment:

- NRA states that the “Structural causes of obesity dooms (*sic*) proposal.”

Response:

- Inaction is not the solution – a combination of interventions is needed
- Complements many other efforts by DOHMH & NYC to address obesity

Rationale for targeting calories only

Comment:

- Targeting calories for mandatory posting is insufficient because:
 - Consumers need additional information to make informed decisions about what to consume
 - Most consumers are unaware of the recommended daily calorie intake levels

Rationale for targeting calories only

Response:

- Restaurants may supply other nutritional information
- Calories key to public health objectives
- Reductions in calorie intake will reduce consumption of other nutrients such as salt & fat

Rationale for targeting calories only

Response:

- NRA states that affecting energy balance by 100 calories per day could prevent weight gain in most of the population
- Calorie “literacy” *is* low - but, even consumers who are unaware of their recommended daily intake can compare calorie counts of offerings

Need for more intensive nutrition education

Comment:

- The public needs more intensive nutritional education

Response:

- DOHMH supports nutritional education and physical activity for all age groups
- Is actively engaged in day care, school, worksite and health care settings
- Calorie posting will help consumers put what they have learned into practice
- Calorie posting gives people the information they need to record & track their daily calorie intake

2. Feasibility

- Cost
- Displays
- Customization
- Accuracy of calorie information
- Range of food selections

Cost

Comment:

Hale and Hearty Soups, the International Franchise Association, and the National Restaurant Association raised

- cost of menus and menu boards
- cost of analytic testing

Cost

Response:

- DOHMH recognizes that there may be some costs associated with calorie posting, as there have been for other public health interventions (for example, compliance with food safety requirements in the Health Code)

Cost

Response:

- Analytic testing is not mandated
- Calorie content values must be based on a verifiable method,
 - these include nutrient databases
- Cost of compliance should be compared to the costs of obesity
 - Diabetes medical costs > [\\$90 billion annually](#)

Displays

Comment:

- Lack of alternative format options; “one size does not fit all”
- Carvel Corporation frustrated that its alternative submissions not approved under the previous proposal
- The NRA contended that the existing efforts by restaurants are substantive and evolving

Displays

Response:

- DOHMH incorporated all approved alternative design elements in modification of §81.50
- Current proposal is more flexible
 - Font size and placement
- Some complied with §81.50 and reconfigured menu boards
 - Subway had no complaints (customer or franchises)
 - Calorie posting did not hurt sales

Customization

Comment:

- A large share of orders are customized by the consumer
- Customization changes the calorie count of the standard menu item
 - The calorie counts provided may not reflect the actual calorie count of food as it is consumed

Customization

Response:

- Customization is not an argument against calorie posting
 - Many chains already make publicly available calorie information for the “standard” version
- Customization often results in a small change in calorie content
- The selection of the standard item is the most important calorie decision made by the patron



Customization



- Example:
 - “hold the pickles” = - 0 cal
 - “hold the onions” = - 5 cal
 - “hold the mayo” on a Burger King WHOPPER® Sandwich = - 160 cal (-21%)
- Standard item selection
 - Burger King fire-grilled hamburger (290 cals)
 - DOUBLE WHOPPER® Sandwich (900 cals)
 - TRIPLE WHOPPER® Sandwich with Cheese (1230 cals)

Accuracy of calorie information

Comment: Concern that restaurants may be liable for inaccurate calorie information

Response:

- Under the NLEA, Congress imposed same requirement on food producers
- Where chain restaurants already provide this information, liability will not change
- DOHMH neither has authority to create a “safe harbor” clause, nor does it believe one is warranted
- Restaurants are free to put a disclaimer on the bottom of the menu board or menu

Feasibility

Restaurants' huge range of food selections

Comment:

NRA pointed to the extraordinary diversity of its industry, particularly with respect to food selections, which precludes a “one size fits all regulatory mandate.”

Restaurants' huge range of food selections

Response:

- Chain restaurants are highly standardized despite offering a wide range of selections
- Their business models are based on replicating the same dining experience at multiple locations

3. Regulatory Strategy

- Meaning of “standardization”
- Scope of proposal

Regulatory Strategy

Meaning of “standardization”

Comment:

NRA contended that:

- “Standardization” is a myth
- FDA, in implementing the NLEA, recognized variation unique to restaurant foods, as compared to packaged foods

Regulatory Strategy

Meaning of “standardization”

Response:

- Standardization = “Cause to conform to a standard”
 - A concerted effort to meet a level of consistency
 - *Not* completely identical products
- Chain restaurants such as McDonald’s support the concept of standardization in public documents

Regulatory Strategy

Meaning of “standardization”

Response:

- Business models based on replicating the same dining experience at multiple locations
- *“for its sandwich buns alone, McDonald’s works with more than 20 bakeries across the U.S., all of which must make the product the same size, color, texture, flavor and consistency”*

-Director of Quality Systems

Regulatory Strategy

Scope of proposal

Comment:

- The scope of this proposal is unclear and also raises questions whether the definition of covered restaurants might penalize non-NYC based chains

Regulatory Strategy

Scope of proposal

Response:

- The proposal applies equally to chain restaurants irrespective of the location of the company
- A chain with 15 locations within NYC will be covered
- Only displays within a restaurant or produced for the [purpose of ordering food](#) from the establishment (take out menu) require the listing of calorie information

Summary

- 82 comments were received from the public, addressing a range of views
- 13 comments were in opposition – many reflecting the view of the affected industry
- Most comments favored re-enactment of the measure
- The department recommends no substantive changes in the proposed amendment after careful review of the comments

Proposed Modification

- Definition of food item tags, correction to a drafting error:
 - (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.

DOHMH Recommends Approval of the Amended Calorie Posting Proposal



§ 81.50 Calorie Posting Response to Comments Addendum



Lynn Silver, MD, MPH

Assistant Commissioner, Bureau of Chronic Disease Prevention and Control

Cathy Nonas, MS, RD

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January 22, 2008

New York State Restaurant Association v. New York City Board of Health, et al., 07 Civ. 5710 (RJH), USDC SDNY, 9/11/07.

“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.”

– Judge Holwell