

Subject: < No Subject >

From: ()

Subject: Contact NYC Rules

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This form resides at

http://www.nyc.gov/html/nycrules/html/contact/contact_form.shtml

Message Type: Complaint

Message Topic: Proposed Rules

Contact Information: Anonymous

State: NY

Country: United States

Message: Regarding the 16 oz. Drinks - The size is NOT the problem here, the problem is the ingredients in it everyone wish to ignore.artificial foods is what make the people sick, be it 1 oz or 50 oz.So exercising power in a seemingly care for the people issue is wrong here.

REMOTE_HOST: 208.111.129.108

HTTP_USER_AGENT: Mozilla/5.0 (Macintosh; Intel Mac OS X 10_7_3) AppleWebKit/534.53.11 (KHTML, like Gecko)
Version/5.1.3 Safari/534.53.10

STATEMENT OF NORMAN SIEGEL

Before the Department of Health and Mental Hygiene

July 24, 2012

My name is Norman Siegel. I am a New Yorker. I was born and grew up in New York City. I am a proud product of the New York City public schools. Currently, I live and work in New York City as a civil rights/civil liberties lawyer and I am a partner in the law firm of Siegel Teitelbaum and Evans, LLP. I love New York City, especially its people. I prefer to drink egg creams, cranberry juice, Perrier, San Pellegrino, skinny water and milk. I rarely drink soda. I am here today because of the importance of the matter before this government body. Thank you for holding this public hearing and giving New Yorkers the opportunity to express their thoughts on this matter.

I agree that obesity is a serious problem negatively affecting our country, our city, our neighborhoods and most important, New Yorkers. I also agree that the government should work to combat it. However, as important as the issue of obesity is, a larger and more fundamental issue is at stake in this proposal by Mayor Bloomberg. It's the question of the appropriate role of government when it attempts to remediate a societal problem such as obesity. I respectfully submit that the Mayor's proposal is inappropriate, overreaching and antithetical to the principles and values of freedom and liberty that are the cornerstones of America

and New York City. I urge you to reject the Mayor's proposal.

The most objectionable aspect of the Mayor's proposal is the intrusive role that government is taking on by banning sugary soda drinks in cups and containers of more than sixteen ounces. By doing so, the government is inserting itself into the daily decisions of its residents in a manner that exceeds a necessary or appropriate response to combat obesity. It is one thing for the government to support education about obesity and healthy choices, but it is another for it to make those choices for its citizens without their consideration or consent. Tackling the issue of obesity is the right thing to do, but not in a way that demeans New Yorkers' freedoms as consumers and our capability to make decisions for ourselves. The cost of implementing this ban allows the government, in our names, to overstep its authority and encroach upon our liberty. The end does not justify the means.

I am skeptical that this proposal will produce the intended consequence of lowering obesity rates, as it leaves many gaps. The regulation does not include a ban on juice-based drinks or alcohol, and does not address high caloric foods.

Twenty percent of high school students in New York City said that they had no physical education classes in an average week. The government should address the insufficient physical education programs in our schools and our lack of after

school programs and community recreation centers before it imposes Mayor Bloomberg's restrictive ban.

A public campaign to educate against these sugary drinks, similar to the apparently successful anti-tobacco campaign, would allow New Yorkers to evaluate what they choose to drink.

History teaches that Government's attempt, almost a century ago, to ban "intoxicating liquors" (the 18th Amendment to the Constitution of the United States) did not work. (the 21st Amendment that repealed the 18th Amendment) We should reflect on this historical reference in considering the Mayor's proposal.

The Mayor's proposal, although well intentioned, should be rejected. The Mayor, this body and the people of New York can and should work together to challenge and ameliorate the obesity problem. We do not need edicts as to what we should drink or eat. We do not need proposals that that will divide us. We need to find common ground and work together. Educate us. Inform us. Persuade us.

Respect our ability to figure out what is in our best interests. That's the appropriate role for government. Employ all available voluntary approaches to the problem before as a last resort you consider implementing Mayor Bloomberg's prohibition. I respectfully submit that has not happened yet.



DISTRICT OFFICE
 217 HAVEMEYER STREET, 2ND FL.
 BROOKLYN, NY 11211
 (718) 963-3141
 FAX: (718) 963-4527

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July 24, 2012

The Board of Health
 Department of Health and Mental Hygiene
 125 Worth Street
 New York, NY 10013

Dear Distinguished Members of the Board of Health:

I am writing to you today to submit testimony regarding the proposed amendment to Article 81 of the New York City Health Code, which outlines a ban on sugary drinks sold in containers over 16 fluid ounces.

When I walk around my district, I see every day the toll obesity and chronic disease take on the community. During my ten years on the City Council, I have advocated for legislation to help curb obesity and asthma rates, and I have spoken out on the need to build and create healthier communities. So I understand Mayor Bloomberg's desire to do something to lead the citizens of New York towards a healthier lifestyle.

But as noble as that goal may be, Mayor Bloomberg's proposed size restrictions on sugar-sweetened beverages is absolutely the wrong path. This initiative is taking the focus off of the need for comprehensive solutions to tough and intractable problems. It's an ineffective quick fix that won't move the needle at all.

When I think about why some New Yorkers struggle with obesity, I think of things like the lack of parks and green space where people can safely exercise – especially people who can't afford a fancy gym. I think of the lack of physical education in our schools – due to budget cuts and lack of support from Mayor Bloomberg's own Department of Education. I think of the lack of healthy food options in certain neighborhoods. I do not think of a medium Coke, a 20oz Gatorade or a bottle of Snapple. Drastically and arbitrarily restricting choice does nothing to educate people about what it means to be healthy.

Williamsburg had one of the highest obesity rates in New York, but ranks amongst lowest in amount of park space per 1000 residents, tree plantings, and access to green markets. It has the Brooklyn Queens Expressway run in between our largest areas of recreational park space in the heart of our largest population of low income residents. A soda ban will not begin to solve the problems of the constituents of the 34th District. The size of a soft drink will not educate a consumer on health and wellness.

The community of Williamsburg has taken the initiative in constructing a comprehensive plan to truly remedy the ills of public health in our community. They have invested in feasibility, economic and environmental studies for the decking of the BQE where the neighborhood can add nearly two acres of park land in the epicenter of the poorest section of our community. Desperate for change we sought real solutions to real problems. Food pantries with Hydroponic gardens, kid's bike ride clubs with local area doctors, block by block greening initiatives and aggressive educational campaigns are making the difference in our community. We are addressing the issues at its essence by educating the consumer, not limiting their choice.

We should not burden our small businesses with policy that would cause insignificant change and potentially harm the economic engine of our City. As Chair of New York City Council's Committee on Small Business, I understand the vital role that small business plays in driving the city's economic resurgence. Under this proposal, the pizza parlor or deli on the corner can't sell 20oz sodas or sports drinks, while the pharmacy chain store next door can. That's not fair, and ultimately it means that the mom and pop store – already under tremendous pressure – can't compete. It means they can't hire workers, give employees raises or expand their business. At a time of economic uncertainty, we should help small businesses grow, instead of piling on insignificant restrictions.

I have always fought hard in the interest of my constituents and that includes advocating for healthier communities and a vibrant business climate. I stand ready to work with the Mayor and the Department of Health on addressing the tough health issues facing our city. But this proposal is not the way forward and I hope that, as Members of the Board of Health, you will join me in advancing sound policy to combat obesity and unhealthy lifestyles without unduly burdening the working people of New York City.

I respectfully request that this testimony be considered in the Board of Health's deliberation of the proposed amendments to Article 81 and that you vote "no" come September.

If you have any questions regarding the concerns outlined above, please feel free to contact Antonio Reynoso at areynoso@council.nyc.gov or (718) 963-3141.

Sincerely,



Diana Reyna
Chair of the Small Business Committee
Council Member, 34th District
Brooklyn/ Queens

10/10/12

Testimony of G. Oliver Koppell
New York City Council Member
before
Board of Health:
A Public Hearing Concerning the Proposed Amendment of Article 81 of
the Health Code, Related to the Maximum Size of Sugary Drinks and
Self-Service Beverage Cups Sold and Offered in Food Service
Establishments
July 24, 2012

Good afternoon, Commissioner Farley and Honorable Members of the Board of Health ("Board"). Thank for the opportunity to testify at this Public hearing on the proposed amendment of Article 81 of the New York City Health Code, related to the maximum size of sugary drinks and self-service beverage cups sold and offered in food service.

My name is Oliver Koppell. I am a New York City Council Member and I represent the 11th Council District located in the Northwest Bronx.

I am here today to express my strong opposition to the Department of Health & Mental Hygiene's proposal to the Board of Health that would amend the Health Code to prohibit the sale of sugary beverages over 16 ounces in many of New York City's stores and all restaurants and theaters. The proposed regulation is an obstruction of the rights of New Yorkers to choose for themselves the beverages they want to consume and is a clear overreaching of the government into people's everyday lives.

Laws and regulations should not be arbitrary and capricious. This proposed regulation is exactly that. It does not apply to all outlets, so some facilities can continue to sell large sodas. It does not cover all high sugar beverages, just a selected few not based on health

criteria. It does not regulate anything but the size of the cup, so a vendor may sell two 16 ounce drinks to a customer rather than a single 32 ounce drink. The proposed regulation does not limit the prohibition to minors who arguably do not have the maturity to make a choice. We are not prohibiting the sale of a dangerous substance like tobacco. Government should not act in such an arbitrary manner.

Furthermore, the regulation is an extraordinary limitation of a person's right to control his or her own body. We must be careful not to intrude on individual freedom. While this is a minor intrusion it is a disturbing exercise of government power.

This is particularly true since the action will be promulgated by this body, the Board of Health, which is *solely* appointed by the Mayor. If this regulation of thousands of businesses and millions of consumers is to be mandated it should be mandated by the legislative body of the City elected by the people and then put before the Mayor as with most far reaching regulations. The ban on smoking in restaurants was enacted in just this way. That is why we have a legislative body and not just an elected Mayor.

While there is no doubt that obesity is a serious issue in New York and across the country, this law is neither a proper nor effective way of addressing the problem. It should not be up to the government to dictate how much of a beverage people are allowed to consume. These sugary beverages are consumed in moderation by many healthy and health-conscious New Yorkers each day and are commonplace and enjoyable as a part of countless pastimes such as movies or sports exhibitions and most of the time is not

reflective of an unhealthy lifestyle. There are much better ways to tackle the obesity epidemic than through this arbitrary and unhelpful law.

Our government allows its citizens to consume drinks and food that are far more detrimental to our health than a 20 ounce soda. This infringement on the rights of New Yorkers leads us to ask, "What will be banned next?" If the government can limit what and how much of a beverage we can consume, many fear that this sort of regulation will expand to other areas in which the people should be free to make their own choices. Should the government mandate that vegetables be served with every meal, regulate the size of candy bars and pizza slices, or ban bars from serving any customer more than two drinks all under the pretense of protecting our health?

I strongly recommend that this proposal be rescinded, as it is an arbitrary, ineffective, and unfair law that will cause more frustration and problems than good for the people of New York. Let the people choose for themselves how much soda they wish to consume—there are more effective approaches to battle obesity.

**COMMENT ON PROPOSED AMENDMENT OF
ARTICLE 81 OF THE NYC HEALTH CODE**

By Ruth Kava, Ph.D.,
Senior Nutrition Fellow

For

The American Council on Science and Health

July 24, 2012

1995 Broadway, Second Floor

New York, NY 10023

PH: 212-362-7044

Fax: 212-362-4919

WWW.ACSH.org

Background

The American Council on Science and Health (ACSH) is a consortium of leading physicians and scientists who are concerned that the public receive accurate, science-based information about public health matters. Our objective is to restore science and common sense to personal and public health decisions, in order to foster a scientifically sound and sensible public health policy for the American people.

The proposed regulation to establish the maximum size of sugary beverages offered and sold in New York City food service establishments is based on the supposition that such restriction will lower the calorie consumption and thus the prevalence of obesity among New Yorkers.

We concur that obesity is a significant health threat, and that obesity in the young points to earlier acquisition of morbidities such as type 2 diabetes than has previously occurred. Yet recent data indicate that in New York City, at least, the proportion of young school children that are obese has actually declined somewhat in the last few years.¹ We note that this welcome decline has

occurred without the institution of governmental restrictions on beverage size.

Further, consumption of excess calories from any source, not just calorically sweetened beverages, will lead to weight gain and should be discouraged. But calorie consumption from a variety of foods has increased substantially over the last few decades.

For example, while calorie consumption from caloric sweeteners increased by approximately 9.5% between 1970 and 2009, energy intake from added fats and oils and dairy fats increased by 45% over the same period of time.² Thus a focus on sweeteners as the major cause of obesity seems inappropriate. Indeed, a focus on a single source of calories, or a single food is inappropriate, likely to be ineffective, and might even be counterproductive.

Although increasing portion size has likely been a contributing factor to increased food consumption, studies that have demonstrated this effect have typically been performed under controlled conditions.³ It has not been shown that a mandated restriction on size of beverages sold has an effect on calorie consumption. Indeed, it is certainly possible that consumers who want larger sizes will simply purchase more than one of the allowed

smaller containers, thus circumventing the intended goal of reducing calorie consumption.

The proposed restriction constitutes an unwarranted experiment on New Yorkers, without their consent and should not be imposed upon them.

¹ Centers for Disease Control and Prevention. Obesity in K-8 Students – New York City, 2006-07 to 2010-11 School Years Morbidity and Mortality Weekly Report 2011;60(49):1673-1678.

² USDA/Economic Research Service. Average daily per capita calories from the U.S. food availability, adjusted for spoilage and other waste. <http://www.ers.usda.gov/data-products/food-availability-%28per-capita%29-data-system.aspx> accessed July 1, 2012.

³ Wansink B, Painter JE, North J. Bottomless bowls: Why visual cues of portion size may influence intake. Obesity Research 2005;13(1):93-100.

I would like to answer Councilwomen James and Viverto point by point

a. the ban, if implemented, will yield an adverse economic impact for small businesses and may result in job losses; this is what they said about no smoking in restaurants and workplaces. In fact, if you 'even the playing field' by making this mandatory for all restaurants, then all restaurants will be equal. Furthermore, most restaurants serve 16 ounces or less. The ones that will have to change will be the quick serve chain restaurants, and they may save money if their default moves from a mid-size to a small.

b. the ban would harm producers that ship soda-syrup and cups across state lines into New York, possibly violating the federal commerce clause; Indeed, there might be less soda-syrup shipped but that remains to be seen As far as cups are concerned, they might make money because they would not have to produce as many sizes, so they could save money by increasing production of smaller cups.

c. the ban infringes on the civil liberties (choice) of New Yorkers, and may be overturned isn't is a concern that quick serve chain restaurants and movie theatre infringe upon our civil liberties (choice) by making the large size the cheaper one, by making the default a medium size instead of a small, by not offering us a smaller size at all or if they do, it's the worst deal? Isn't that an infringement on our civil liberties? We have literally swallowed the beverage companies marketing practices that promote 'bigger is better'. Why not ask them to help save consumers money at the counter as well as with health care by offering a small size at a fair price?

And choice very much matters. In 2011, federal officials rejected Mayor Bloomberg's proposal to bar the city's food stamp users from buying soda and other high-sugar drinks. This proposal, if passed, might also be struck down. Mayor Bloomberg has done a significant amount to increase access of healthy food – NYC has the largest incentive program in the country for food stamp users at farmers markets, we have almost 500 Green Carts selling fresh fruits and vegetables only in underserved areas and this season we are giving 83 EBT machines to help food stamp recipients increase their produce consumption, we have worked with thousands of bodegas to ensure that they have low-sodium canned goods and sell healthy sandwiches and offer low-fat milk. But restriction has been an important part of health too. There is no smoking in restaurants, in workplaces, in parks and beaches; we have a trans fat restriction in all restaurants, we have calories on menus at all chain restaurants; we have food standards for all city agencies that include both an increase in healthy

foods and a restriction on unhealthy ones such as sugar sweetened beverages. Without these restrictions, our schools could still sell soda.

For a ban meant to address health in low-income communities, it was particularly concerning to us that it was brought forth during a time when the city was considering cuts to minority health programs. And scratching the surface of the proposal, we believe the ban does not consider the complexity of how and why people acquire food and drink, and instead applies a simplified solution to a layered problem (one highly likely to fall short of its intended goal). For instance, the ban would exempt drinks over 16 ounces that contained over 50 percent milk. This would include drinks like a 24 fl. oz. serving of a certain corporation's popular blended crème caffeinated beverage, a drink that is roughly 470 calories -- equivalent to the amount of calories in a medium 10-ounce steak. Yet it would ban a single-serving of soda, juice, enhanced water beverage, tea, coffee or sports drink of equivalent size if purchased from certain establishments. Are you suggesting we restrict things based on calories alone? A single size of soda or 'enhanced' water has nothing but calories and sugar -- is that really what you want to promote to anyone in New York City if you are worried about the health of New Yorkers?

It's also important to look at where people acquire such large drinks. The average New Yorker goes to the movie theater (known for large single-servings of beverages) only four times a year, and attends sports venues even less regularly. Daily trips to the neighborhood deli store (or 'bodega') are much more common occurrences. Such neighborhood stores selling over 50 percent food products fall under the jurisdiction of the City's Department of Health, and therefore would be limited by the ban. Those selling under 50 percent food products would be exempt from the ban. This effectively means that two stores on the same block might very well be held to different standards. In fact, some major chain stores would be exempted by this same standard. This is wrong. We do not have jurisdiction over bodegas. Bodegas will still be able to sell overly large, empty calorie sweetened drinks that can make people sick.

This kind of arbitrary standard is what leads us to believe that the proposal -- if passed -- would not only be ineffective, but also harmful to small local businesses, specifically those servicing low-income communities. Actually, this isn't arbitrary. We wish we could reduce the portion even more. This 'standard' is because companies already produce 16 ounce bottles so we know this is doable.

Most importantly, we simply feel that the administration should shift focus towards the much more difficult goal of creating programs to subsidize

healthy food access, including implementing the recommendations outlined in the 2009 New York City Council report 'FoodWorks: A Vision to Improve NYC's Food System.' The real issue at hand, in our opinion, is access to low-cost, quality healthy food across this city. We need to do even more to bring comprehensive food-access programs to local communities. This is not correct and not fair. See above re access, and we continue to work hard to increase it. Every year we compare healthy behaviors between rich and poor neighborhoods and every year the disparity gets smaller because of all the work we are doing to increase access to healthier foods in the neighborhoods that need them the most

While community-based food advocacy coalitions have taken on the daunting task of developing and supporting localized community-supported agriculture (CSAs), food cooperatives, farmers markets, and school-based food networks, the city makes it increasingly difficult for local communities to establish and maintain neighborhood gardens (a major source of localized food growth), under the fear of them becoming permanent institutions that would be difficult to displace. If the administration is truly interested in getting New Yorkers outdoors, there should be appropriate funding put towards the rehabilitation of outdoor parks and playgrounds, as well as indoor recreational spaces, to encourage New Yorkers (many of whom cannot afford a gym membership) to exercise. This is completely untrue and it is shameful that you keep forgetting the work that has made you proud to be city councilwomen. xxxxxxxx

A ban is easy, establishing real solutions in the long term is much more difficult. And frankly we believe moving towards any of these goals would have a greater impact on public health than a beverage ban that might hurt small businesses, would be arbitrarily applied, and may very well be illegal. When Mayor Bloomberg proposes more real solutions (like this) to our public health problems, we will be standing right behind him. But the soda ban is simply bad for New York.

The deadline for public comment on the soda ban is July 24, 2011

Testimony

Elizabeth Berman, President of Continental Food and Beverage, Inc.

Good Afternoon.

My name is Liz Berman. I am a New York City business owner; I am regional chair for the Hispanic Chamber of Commerce; I am a mom; and I am a member of the New Yorkers for Beverage Choices coalition.

New Yorkers for Beverage Choices is a group of more than 91,000 concerned New Yorkers and business owners in New York who have united to take a stand against the proposed beverage size restrictions. We believe that New Yorkers are capable of making their own food and beverage choices and are entitled to the freedom to do so. And today, we are calling on the Board of Health to recognize our petition, with signatures from more than 91,000 New Yorkers and more than 1,500 businesses, as formal comment in opposition to the proposal.

I'd like to enter into the record copies of the more than 91,000 signatures that I have with me today. I'd also like to submit for the record more than 6,100 letters to the Department of Health which oppose this proposal.

The citywide outpouring of opposition to this proposal is a testament to the fact that New Yorkers feel this proposal is arbitrary, unfair and ineffective. From the Bronx to Staten Island, in all five boroughs, in restaurants, in theaters, in pizza shops, coffee shops, in delis and food carts – across the board New York is against this ban.

This proposal restricts choice. New Yorkers can make our own choices about what to buy, and in what quantities - whether it's soda, lemonade, tea or a juice or sports drink.

And it is inequitable. It's unfair to the family who shares a soda at the movies on a hot summer day, and it's unfair to the business owner who will lose the sale of a 20 ounce beverage to his neighbor.

I am joined here today by some of the many organizations and individuals who also feel the proposal is unfair and ineffective. The movie theater owners, restaurant owners, health professionals and a few of our City Council Members. Instead of helping us through this recession, the Mayor's misguided proposal will target small business owners with additional regulations.

I think I speak for the more than 91,000 New Yorkers who have signed the petition to oppose this proposal when I say that there are better ways to address the very serious issue of obesity.

There is a better way. Education, both in schools and at home, on the importance of moderation, healthy eating and exercise is better for the community, better for our families and better for our businesses. Arbitrary bans and other restrictive policies like the one being considered today do nothing to teach people about the importance of a balanced and active lifestyle.

Thank you.

Testimony of the NYS Hispanic Chamber of Commerce
Against Health Code Article 81, Proposed Resolution To Amend Serving Sizes In Food
Service Establishments

Before the New York City Department of Health and Mental Hygiene on July 24, 2012

Thank you for the opportunity to speak today on behalf of the NYS Hispanic Chamber of Commerce. We are here because we believe that fighting obesity is important but the proposed resolution to amend serving sizes in food service establishments by Mayor Bloomberg and the New York City Department of Health and Mental Hygiene is misdirected. Specifically, I wish to focus on two areas that really impact my members and our communities:

The first area to consider is the ineffectiveness of the ban in solving the obesity epidemic.

- It's time for serious health professionals to seek solutions that will move the needle on obesity, instead of spending time and money on headline-grabbing gimmicks.
- Soda alone does not cause obesity. In fact, sugar-sweetened beverages play a small and declining portion of the American diet – just 7 percent of total calories.
- By nearly every measure, the contribution of calories from beverages to the diet is declining, yet obesity is still rising. We need to focus on real ideas that address the big picture.

The second issue is the negative impact of the ban on food and beverage industry jobs.

- The food and beverage industry is responsible for creating more jobs than any other in NYC. Mayor Bloomberg is targeting this same industry at a time when we can't afford to slow job growth – especially for small-business owners and low-income New Yorkers who make up a disproportionate number of industry workers.
- This ban will have serious business implications by incurring costs for new equipment and loss of inventory.
- The ban also pushes business to competitors. The disparity of this proposed regulation is obvious in our communities. Its not fair to have one business be able to sell the product and have the business right next door unable to sell the same product.

Finally, I wish to emphasize that businesses are hurting, particularly small Hispanic owned businesses in the city. They struggle with keeping up on current regulations, taxations and potential violation costs. One of my members talked about the high costs of purchasing new cup sizes to fit with the proposed ban. It is important to consider these restaurants and how this ban will further reduce revenues and potentially result in loss of employees. We encourage the Mayor along with the New York City Department of Health and Mental Hygiene to consider the ineffectiveness in combating obesity and the negative impact on Hispanic businesses in NYC and abandon the proposed resolution to amend serving sizes in food service establishments. Thank you.

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LIST OF LARGEST EQUITY HOLDINGS

(BY FAIR VALUE) JUNE 30, 2011

	Shares	Security	Fair Value	Percent of Domestic Equities
1	4,571,451	Exxon Mobil Corporation	\$372,024,682	2.28%
2	807,572	Apple Inc.	271,077,693	1.66%
3	1,928,415	Chevron Corporation	198,318,199	1.21%
4	1,079,125	International Business Machines Corp.	185,123,894	1.13%
5	6,880,799	Microsoft Corporation	178,900,774	1.09%
6	9,466,042	General Electric Corporation	178,529,552	1.09%
7	5,425,512	AT&T Inc.	170,415,332	1.04%
8	2,414,348	Johnson & Johnson Company	160,602,429	0.98%
9	2,436,856	Procter & Gamble Company	154,910,936	0.95%
10	3,747,825	J.P Morgan Chase & Company	153,204,276	0.94%
11	7,214,771	Pfizer Inc.	148,624,283	0.91%
12	4,531,154	Wells Fargo & Company	140,972,177	0.86%
13	1,631,274	Berkshire Hathway Inc.	126,244,295	0.77%
14	1,829,431	Coca-Cola Company	123,102,412	0.75%
15	10,133,922	Bank Of America Corporation	118,554,990	0.73%
16	224,087	Google Inc.	113,473,175	0.69%
17	3,329,367	Oracle Corporation	109,569,468	0.67%
18	2,930,311	Verizon Communications Inc.	109,095,479	0.67%
19	2,600,880	Citigroup Inc.	108,300,643	0.66%
20	1,425,047	Conoco Philips	107,149,284	0.66%
21	1,498,332	PepsiCo Inc.	105,527,523	0.65%
22	4,706,555	Intel Corporation	104,297,259	0.64%
23	1,903,436	Wal Mart Stores Inc.	101,148,589	0.62%
24	1,114,574	Schlumberger Limited	96,299,194	0.59%
25	2,628,136	Merck & Company Inc.	92,746,919	0.57%
26	1,508,028	Qualcomm Inc.	85,640,910	0.52%
27	1,204,762	Philip Morris International Inc.	80,441,959	0.49%
28	745,297	Occidental Petroleum Corporation	77,540,700	0.47%
29	917,978	McDonald's Corporation	77,403,905	0.47%
30	4,953,372	Cisco Systems Inc.	77,322,137	0.47%
31	852,783	United Technologies Corporation	75,479,823	0.46%
32	1,941,426	Hewlett Packard Company	70,667,906	0.43%
33	1,341,430	Abbott Laboratories	70,586,047	0.43%
34	1,661,230	Disney, Walt Company	64,854,419	0.40%
35	598,540	Caterpillar Inc.	63,720,568	0.39%
36	1,225,660	United Health Group Inc.	63,219,543	0.39%
37	655,867	3M Company	62,208,985	0.38%
38	1,190,955	American Express Company	61,572,374	0.38%
39	2,221,032	EMC Corporation	61,189,432	0.37%
40	2,409,146	Comcast Corporation	61,047,760	0.37%
			\$4,781,109,922	29.23%

A full list of the Plan's securities is available upon request.

DISTRICT OFFICE
105 EAST 116TH STREET
NEW YORK, NY 10029
(212) 828-9800
FAX: (212) 722-6378

CITY HALL OFFICE
250 BROADWAY, ROOM 1882
NEW YORK, NY 10007
(212) 788-6960
FAX: (212) 442-1564
mviverito@council.nyc.gov



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THE CITY OF NEW YORK

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TESTIMONY BEFORE THE NEW YORK CITY BOARD OF HEALTH REGARDING THE PROPOSED BAN ON SUGAR-SWEETENED BEVERAGES

JULY 24, 2012

Good morning, my name is Council Member Melissa Mark-Viverito. I represent District 8, which encompasses El Barrio/East Harlem, Manhattan Valley and part of Mott Haven in the Bronx. I appreciate the opportunity to speak before you today regarding Mayor Bloomberg's proposed soda ban, which would prohibit the sale of sugar-sweetened beverages over 16 ounces by most food establishments.

Like the Bloomberg administration, I am very troubled by the city's staggering rates of obesity, heart disease, and diabetes—which are especially high in communities of color like the one I represent. In fact, I have been working hard to address these epidemics in my community for a number of years. Although I share the Mayor's goal for a healthier New York, I remain deeply concerned about this proposed ban for a number of reasons.

This proposed ban would be arbitrary and ineffective. Unlike the trans fat ban which was applied across the board, thereby creating a level playing field, this ban creates an un-level playing field; while the ban will cover soft drinks and teas at any establishment that receives a letter grade from the city's Health Department including restaurants, fast-food restaurants, movie theaters, sports arenas and food carts, it does not prevent consumers from going next door to where they are eating to purchase a large soda at a grocery store or bodega.

This is a major concern for many local East Harlem food establishments – most of which are sandwiched between grocery stores, delis, and bodegas. I recently participated in a walking tour of East Harlem to see how the soda ban might affect our local businesses. After speaking face-to-face with restaurant owners, I am convinced that this ban will have an adverse economic impact on our community's small businesses and could result in job losses.

In addition to hurting our small businesses, it is important to note that this proposed ban is a distraction—a proposal that attracts a lot of media attention and generates a lot of public discussion, but does not address the root causes of the obesity epidemic. As I stated in a letter to the editor published in the New York Times, it is ironic that while the mayor is touting the health benefits of his proposed ban, his Executive Budget would have denied young people exercise opportunities by cutting after-school recreation

programs, if not for restorations by the City Council; school sports and physical education are severely underfunded; schools are being built without gyms; and community leagues are not given the resources that they need.

In East Harlem, more than one in three adolescents exercise fewer than 20 minutes a day, three days a week, as recommended, and teenagers in my community are three times less likely to have a daily gym class compared with students in other neighborhoods. Where are the bold proposals from the Bloomberg administration to reduce these disparities? The City should ensure that our schools meet the New York State mandate of 120 minutes of physical education per week; this is one way that we can lay the foundation for healthier lifestyles at an early age.

The administration should be focusing its attention on issues that will have a greater impact on public health than a beverage ban that might hurt small businesses. The City should be expanding youth recreation programs, school sports and open space, as well as creating programs to subsidize healthy food access and rehabilitating parks, playgrounds and indoor recreational spaces that would encourage New Yorkers to exercise. We need to get to the root of the problem which goes much deeper than the size of a cup of soda.

Thank you.

Testimony Prepared for Public Hearing on Amendment of Article 81

Marianne C. Fahs, PhD, MPH
Professor

CUNY School of Public Health at Hunter College
2180 Third Avenue, New York, New York
www.cuny.edu.sph

email: mfahs@hunter.cuny.edu
tel: 212 396-7758

It is an honor and pleasure to speak before you today. I am a public health economist who for the past 25 years has been studying the relationship between prevention, economic productivity, and policy. My recent experience includes estimating the health and economic effects of tobacco cessation policy and community-based programs in New York City¹, and the potential for health and economic gains among seniors attending senior centers in NYC, associated with evidence-based programs for health promotion and disease prevention.²

The devastating consequences of obesity have far-reaching effects. Others today have testified on the health consequences of obesity which include diabetes, cancer, heart disease, arthritis, depression, and asthma. My purpose is to briefly address the economic consequences of obesity. These consequences affect not only those persons who face serious health threats associated with obesity, but also their families, neighbors, employers, and society as a whole.

Productivity, economic and otherwise, is reduced among those whose healthy lifespan is cut short due to premature morbidity. Economic productivity is also reduced among working family members and friends who must care for their loved ones, e.g. the diabetic who has suffered an amputation, or the person with heart disease who has suffered a stroke. This loss of productivity reduces economic potential and growth. Finally, as a society, we face substantial increases in the marginal costs associated with the preventable health consequences of obesity. These preventable costs result in increased insurance premiums and taxes for everyone.

The economic consequences are not trivial. In original research at the CUNY School of Public Health, my colleagues and I estimated that diabetes alone accounts for \$2.8 billion (2012 dollars) in

¹ Shelley D, Fahs M, Yerneni R, Das D, Nguyen N, Hung D, Chin M, Chang M-D, Cummings M. The Effectiveness of Tobacco Control Among Chinese Americans: A Comparative Analysis of Policy Approaches Versus Community-based Programs. *Preventive Medicine* 47:530–536. 2008

² Fahs MC, Bayaz G, Wang X, Gallo WT. Economic Benefits of Diabetes Prevention and Self-Management Programs among New York City Senior Centers. Final Report. January 31, 2011.

hospital costs for New Yorkers aged 60 and over. These huge costs are the tip of the ice-berg, as this estimate does not include all other costs associated with diabetes, including outpatient physician visits, pharmacy, homecare, transportation, and medical equipment. Moreover, the \$2.6 billion estimate is highly conservative as the enormous human costs associated with pain and suffering by hospitalized patients and their families are not included.

Yet diabetes is only one consequence of obesity. In an article published in the American Journal of Health Promotion in 1998³, the economic cost of obesity to U.S. business was estimated. Updating those figures to 2012 dollars, and adjusting for the increased prevalence of obesity over the past 15 years yields a rough estimate of over \$30 billion. As the biggest regional economy in the US, New York City business bears a disproportionate share of these costs. In a more recent estimate, obesity-related absenteeism costs employers as much as \$6.4 billion a year as calculated by a health economist Duke University, Eric Finkelstein⁴.

Obesity has other consequences. Numerous studies have shown that the obese are less likely to be hired and promoted than the nonobese. Women in particular bear the brunt of that, earning about 11 percent less than women of healthy weight, according to health economist John Cawley of Cornell University. At the average weekly U.S. wage of \$669 in 2010, that's a \$76 weekly obesity tax, born disproportionately among women of color.

Finally, in an article published in the Journal of Health Economics in January 2012⁵, estimates show obese men average an additional \$1,152 per year in medical spending, and obese women average an additional \$3,271 in medical spending. These figures lead to a startling \$190 billion per year in

³ David Thompson, John Edelsberg, Karen L. Kinsey, and Gerry Oster (1998) Estimated Economic Costs of Obesity to U.S. Business. American Journal of Health Promotion: November/December 1998, Vol. 13, No. 2, pp. 120-127.

⁴ Begley, Sharon. As America's waistline expands, costs soar. Reuters. April 30, 2012.

⁵ Cawley, J, Meyerhoeifer C. The medical care costs of obesity. Journal of Health Economics 31 (1) 219-230. 2012.

additional medical spending as a result of obesity, accounting for over 20% of US expenditures. Thus the NYCDOHMH estimates that obesity is costing annually over \$4 billion in direct medical costs in NYC. We have learned from tobacco control that changing social norms is effective in changing behavior. As a way to address the obesity epidemic, and reduce excess and unnecessary economic costs, the reduction in size of allowable sugar drink containers seems a reasonable and responsible public health intervention.

Thank you for the opportunity to speak with you today. I am happy to answer any questions.

- **Good afternoon. My name is Robert Sunshine, and I am the Executive Director of the National Association of Theatre Owners of New York State, a not-for-profit trade association representing movie theatres.**
- **In New York City we represent 52 movie theatres, 312 screens, and 1,800 employees across the 5 boroughs.**
- **Why are we here today?**
- **The Mayor proposed banning the sale of beverage containers greater than 16 ounces with more than 25 calories per 8 ounces.**
- **Yet, the very next day, on National Donut Day, the Mayor said “one donut is not going to hurt you. In moderation, most things are OK.”**
- **Well, sales of sugary drinks at movie theatres are just that. They are moderation defined.**
- **The average New Yorker goes to the movies four times a year.**
- **They purchase concessions twice.**
- **Part of the movie going experience is to share a film with a large audience, as well as to share a large soda and popcorn with your family.**

- **Sharing large sodas and other concessions also helps to keep ticket prices affordable, making a night at the movies one of the most affordable forms of entertainment in the City.**
- **So, for just two days out of the year, New Yorkers are consuming sugary drinks at the movies.**
- **The choices made during the other 363 days out of the year have a much greater impact upon public health and serious issues like obesity.**
- **So again, why are we here?**
- **We are moderation - representing just two sugary drinks per year.**
- **Yet, because we are a so called “food service establishment”, we are included, while grocery and convenience stores are not.**
- **Meanwhile, the same soda from grocery and convenience stores in containers greater than 16 ounces is permissible.**
- **Even more perplexing, high calorie, high sugar, high fat milk based coffee drinks that many New Yorkers consume on a daily basis are similarly allowed under this ban.**
- **Furthermore, a cup with 20 ounces of beer at a baseball game is ok, but not a cup with 20 ounces of soda.**

- **Government should not be in the position to pick winners.**
- **But here we are, with the Board of Health telling us: “drink this, not that,” and “drink it here, not there”.**
- **Not only is this arbitrary, it is just absurd.**
- **This ban will only hurt certain businesses, and its porous and arbitrary nature will insure that it will not make a dent on the rate of obesity.**
- **If the true intent is to lower the rate of obesity, then education, exercise and caloric intake from food should all be part of the equation.**
- **Obesity is a complex issue, and the simplistic demonization of one product will impact the health of certain businesses, not their patrons.**
- **The Health Department and the Mayor say that obesity claims the lives of 5,800 New Yorkers per year.**
- **But how much of this is attributable to sugary drinks, especially when studies show that sugary drink consumption is down, while obesity rates are rising?**

- **Drinks also account for only 7% of caloric intake, so what about the other 93% of calories from foods?**
- **Now, the Mayor will point naysayers to his victory over trans fats, but let's really look at the recent study that came out.**
- **The Board of Health banned trans fats, and then had the gumption to announce that since the ban, consumption of trans fats decreased.**
- **How can that news be taken seriously?**
- **If you ban something, of course there will be less of it consumed.**
- **But did the rate of obesity go down too?**
- **This is the very danger that brings many of us here today.**
- **This is not about obesity.**
- **This is about government control over portion size.**
- **This is about government saying, "drink this, not that" today, and "eat this, not that" tomorrow.**

- **The text of the amendment clearly reads, “To reacquaint New Yorkers to smaller portion sizes.”**
- **This is not just rhetoric.**
- **This is a chilling opening to greater regulation over what New Yorkers can consume.**
- **We have an unelected body making decisions for New Yorkers about what they can consume, and where they can consume it.**
- **Clearly, if this is enacted, it will not just be about soda.**
- **Today’s hearing is just another step down the slippery slope toward further government intrusion into private decisions.**
- **Realistically, there are times when governments can legitimately say “eat this, not that” and “eat it here, not there”.**
- **At least, “drink it here, not there” works when referring to state and local regulations over alcohol consumption to reduce drunk driving.**
- **At least “eat it here, not there” works when referring to the consumption of food and beverage in certain public transit locations to reduce vermin and improve fire safety.**

- However, because of the arbitrary nature of this ban, its loopholes, and misguided focus on just one kind of beverage, the public health will not be improved by saying “drink this, not that” and “drink it here, not there”.
- Simply put, the Mayor is looking in the wrong direction.
- A better option would seek to partner with businesses, parents, schools and elected officials on a comprehensive strategy to address obesity.
- I think the Mayor said it best when he said “New York City is not about wringing your hands; it's about doing something”.
- But, doing nothing is better than this ineffective measure that will lead to more hand wringing by businesses and the public.
- By just doing something, the Mayor is imposing an arbitrary, unfair, and hopeless ban that will only serve to lessen the lines at the movies, instead of the waistlines of its patrons.
- This regulation will only serve to hurt our business, not lower obesity rates, as concession revenue is an important part of theatre operations.
- With ticket sales at a fifteen year low, and increased competition from video on demand, this is yet another hurdle for the theatre business.

- **To make up lost concession sales, theatres will likely have to raise ticket prices, or freeze hiring.**
- **With a 10% unemployment rate, now is not the time to burden NYC's businesses with more mandates, or subject them to \$200 violations.**
- **Our industry supports collaborative approaches to tackling the serious public health problem of obesity.**
- **However, we remain steadfastly opposed to this arbitrary, misguided, and downright foolish ban that is an affront to personal liberty.**
- **"Eat this, not that" is a nice book, but not a good approach by government to curb obesity.**
- **We respectfully suggest that this proposal be withdrawn. Thank you.**

DISTRICT OFFICE
100 STUYVESANT PLACE, 6TH FLOOR
STATEN ISLAND, NEW YORK, 10361
(718) 556-7370
FAX: (718) 556-7389

CITY HALL OFFICE
250 BROADWAY, ROOM 1868
NEW YORK, NEW YORK 10007
(212) 788-6972
FAX: (212) 341-3045
drose@citycouncil.nyc.gov



THE COUNCIL OF
THE CITY OF NEW YORK

DEBI ROSE

COUNCIL MEMBER
49TH DISTRICT, STATEN ISLAND

CHAIR
CIVIL RIGHTS COMMITTEE

COMMITTEES
AGING
EDUCATION
HEALTH
HIGHER EDUCATION
TRANSPORTATION
OVERSIGHT & INVESTIGATIONS

CONTACT: Stephannia Cleaton
Communications Director
(718) 556-7370

7/24/12

COUNCILWOMAN DEBI ROSE SURVEY FINDS NEW YORKERS STRONGLY OPPOSED TO MAYOR'S PROPOSED BAN ON SUGARY DRINKS

More than 65 percent of 200 people surveyed in a weekend poll state they are against the ban

CITY HALL ---New Yorkers are taking a "Big Gulp" against the mayor's proposal to ban sugary 16 oz. soft drinks. After two months of digesting the mayor's proposal, 65 percent of the 200 people who responded to a survey conducted this past weekend by the Office of City Councilwoman Debi Rose stated that they strongly disagreed with the ban.

"Most of the people who answered the survey do not want the government or the City of New York to regulate their purchase of soft drinks," said Councilwoman Rose (49th District/Staten Island), whose survey was presented today at a public hearing held by the Board of Health.

When asked how well they understood the details of the proposed ban and how they would be affected, 86.50 percent of the respondents overwhelmingly stated that they completely understand the details and how they will be affected by them.

Respondents were also asked if they were satisfied the ban would apply to certain businesses such as movie theaters, restaurants and fast food establishments but not to supermarkets, bodegas or chain retailers. Fifty-one percent of the respondents were extremely dissatisfied.

A majority of business owners who took the survey (77.37percent) said the ban would not have a monetary impact on their business. Of the business owners who said the ban would have a monetary impact, 96.67 percent said it would be a negative impact.

"We all want a healthier New York but Mayor Bloomberg needs to rethink his proposal because an overwhelming number of New Yorkers are opposed to limiting the size of soft drinks," said Councilwoman Rose.

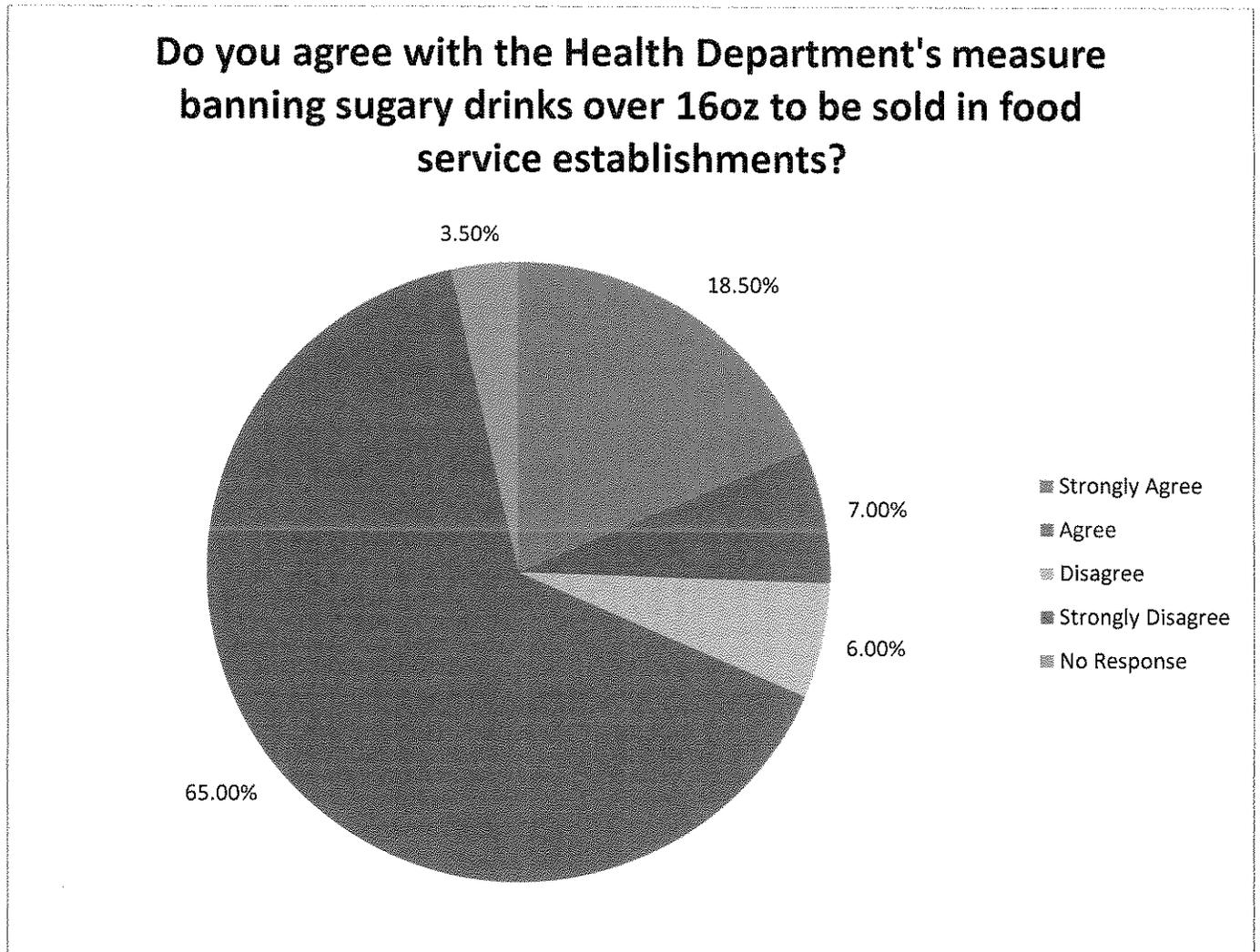
(Survey and e-mails to Councilwoman Rose attached.)

"Keeping Constituents First"

Survey Results:

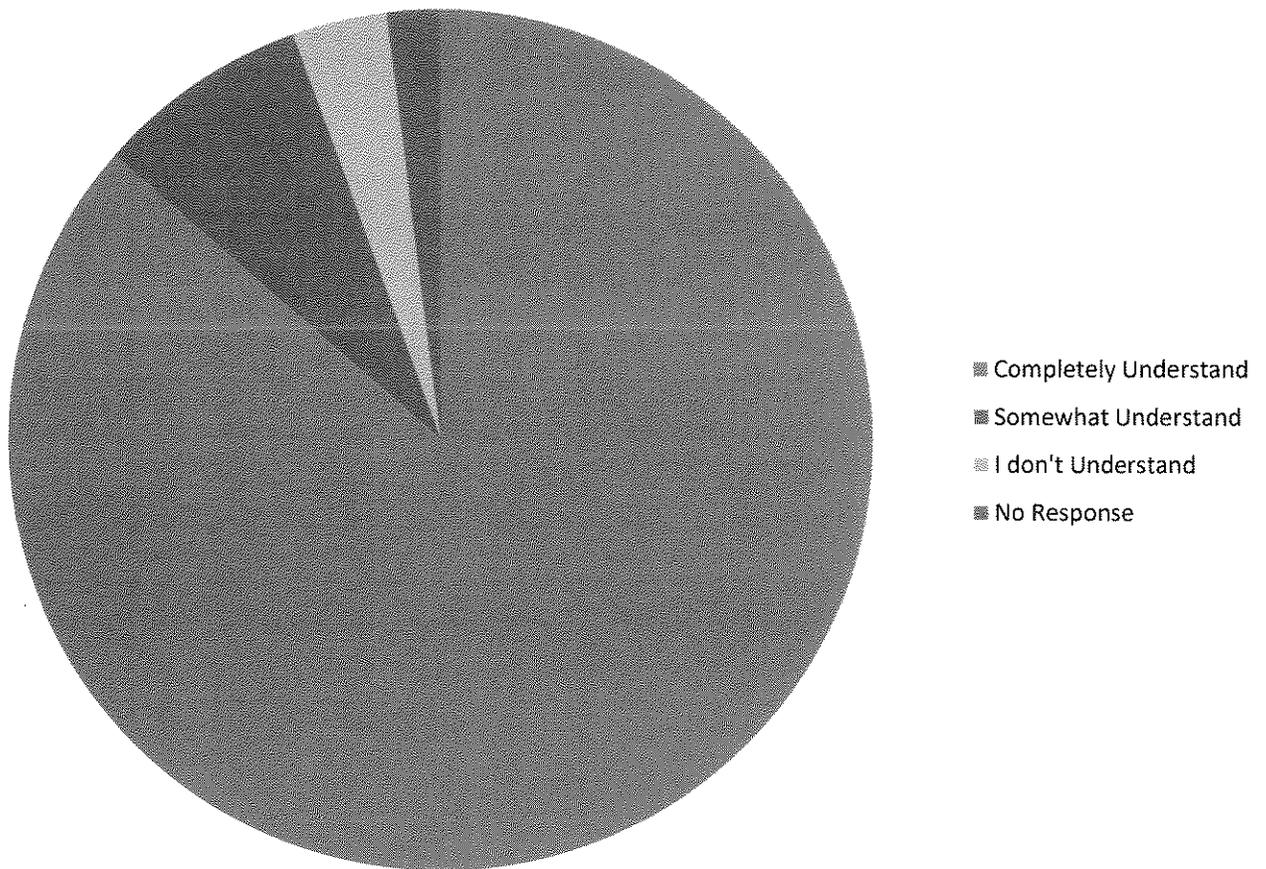
This Survey was completed by 200 respondents in total.

- When asked, "Do you agree with the Health Department's measure banning sugary drinks over 16oz to be sold in food service establishments?", 65% of respondents **Strongly Disagree** with the ban. The chart below contains further breakdown of the responses.



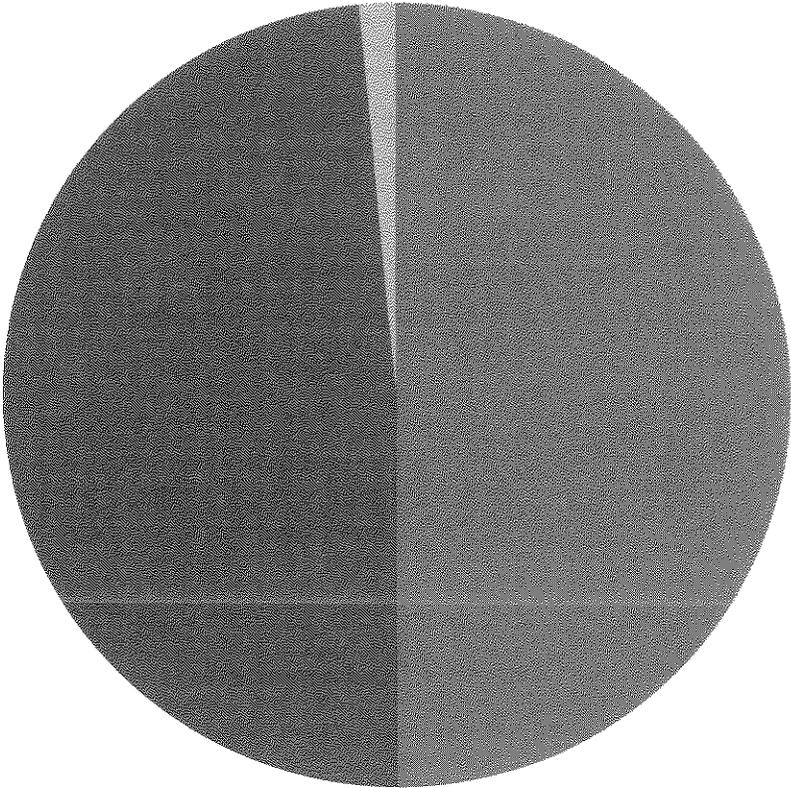
- When asked, "How well do you understand the details of this ban and how it will affect you?" 86.50% of respondents overwhelmingly stated that they completely understand the details and how they will be affected by them. The chart below contains further breakdown of the responses.

How well do you understand the details of this ban and how it will affect you?



- When asked “The public hearing on this proposal will take place on Tuesday, July 24th at 1p.m. in Long Island City in Queens. Would you be more likely to attend if it were held at a central location during evening hours?” respondents were about equally divided with 50% saying they **yes** they would attend and 48.5% saying **no** they would not attend. The chart below contains further breakdown of the responses.

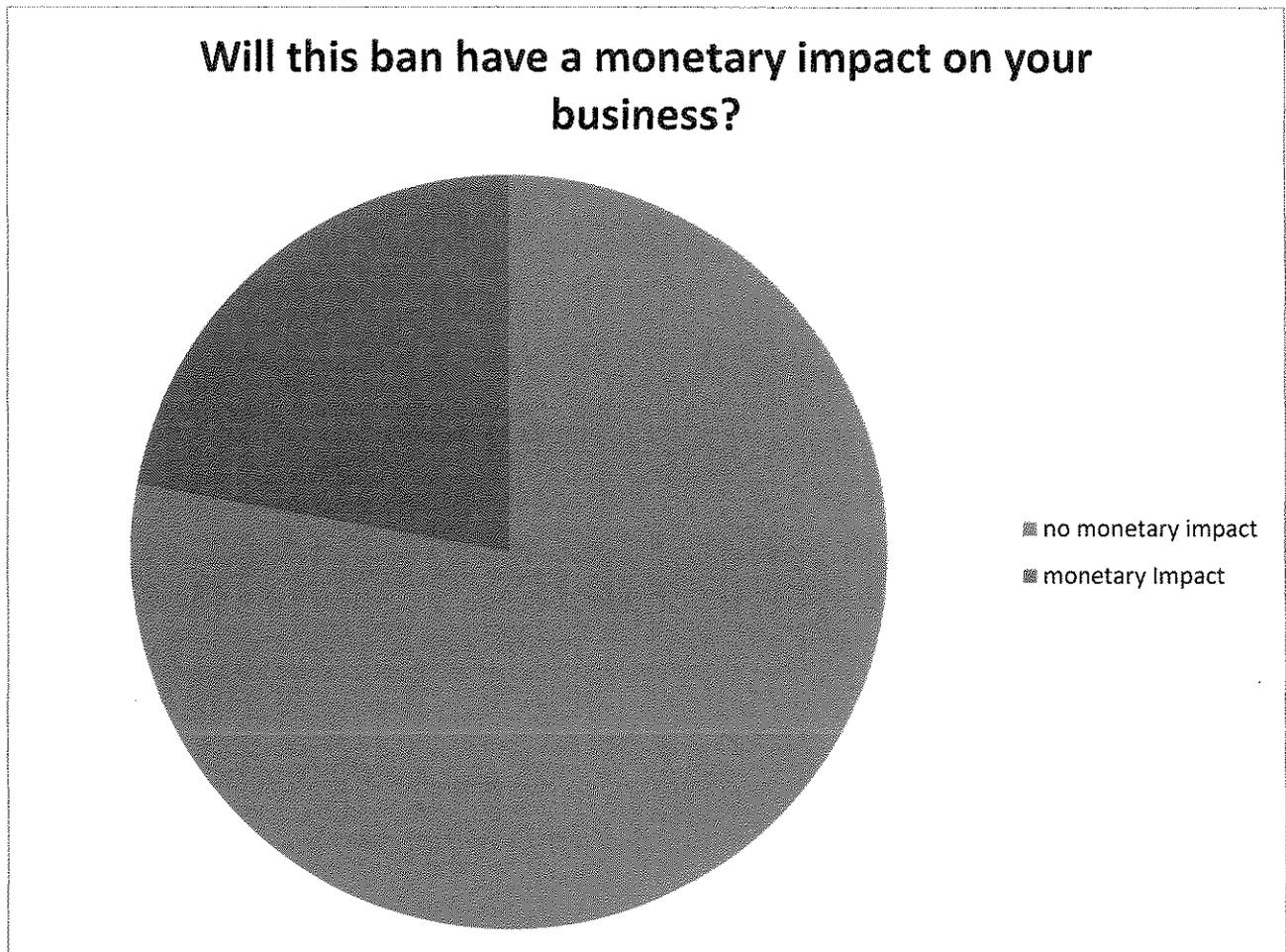
The public hearing on this proposal will take place on Tuesday, July 24th at 1p.m. in Long Island City in Queens. Would you be more likely to attend if it were held at a central location during evening hours?



- Yes
- No
- No Response

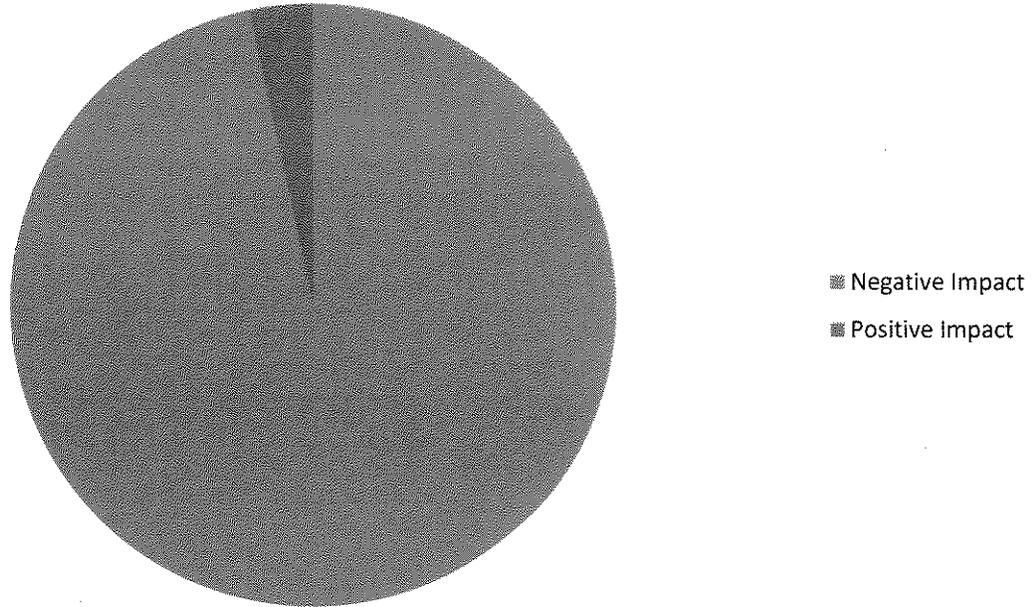
137 respondents, 68.5% of respondents, Identified as small business owners.

- When asked, “Will this ban have a monetary impact on your business?” 77.37% of respondents replied with **no monetary impact**. The chart below contains further breakdown of the responses.



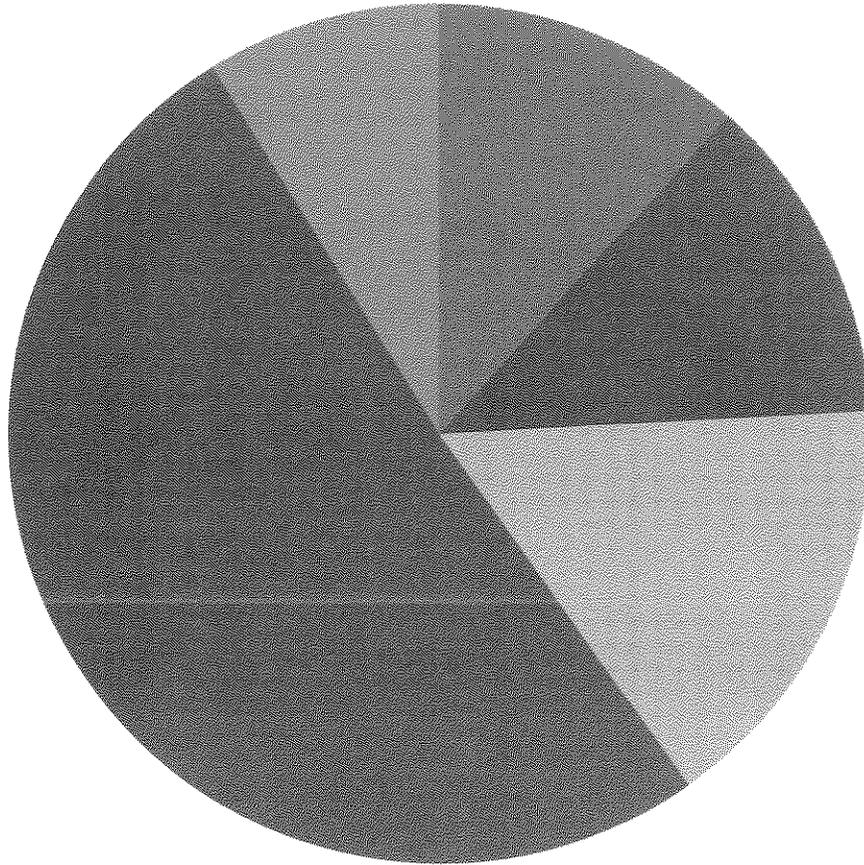
- When asked “If yes, will the effect be negative or positive?” The majority of those who responded to the previous question said it would be a **negative** impact with 96.67%. The chart below contains further breakdown of the responses.

Will the effect be negative or positive?



- When asked, “How satisfied are you about the ban applying to certain businesses such as movie theatres, restaurants and fast food establishments etc. but not to supermarkets, bodegas or chain retailers?” 51.09% of respondents were **Extremely Dissatisfied**. The chart below contains further breakdown of the responses.

How satisfied are you about the ban applying to certain businesses such as movie theatres, restaurants and fast food establishments etc but not to supermarkets, bodegas or chain retailers?



- Extremely Satisfied
- Satisfied
- Dissatisfied
- Extremely Dissatisfied
- No response

DISTRICT OFFICE
150 STUYVESANT PLACE, 6TH FLOOR
STATEN ISLAND, NEW YORK 10301
(718) 556-7370
FAX: (718) 556-7389

CITY HALL OFFICE
250 BROADWAY, ROOM 1808
NEW YORK, NEW YORK 10007
(212) 788-6972
FAX: (212) 341-3045
drose@council.nyc.gov



THE COUNCIL OF
THE CITY OF NEW YORK

DEBI ROSE

COUNCIL MEMBER
40TH DISTRICT, STATEN ISLAND

CHAIR
CIVIL RIGHTS COMMITTEE

COMMITTEES
AGING
EDUCATION
HEALTH
HIGHER EDUCATION
TRANSPORTATION
OVERSIGHT & INVESTIGATIONS

CONTACT: Stephannia Cleaton
Communications Director
(718) 556-7370

7/24/12

**EMAILS TO COUNCILWOMAN DEBI ROSE REGARDING
MAYOR'S PROPOSED BAN ON SUGARY DRINKS**

----- Original Message -----

From: Roberta O'Hanlon [mailto:Roxxanne925@aol.com]
Sent: Monday, July 23, 2012 04:19 PM
To: Rose, Deborah
Subject: The government is getting too involved in our lives.

Dear Councilmember Rose,

I'm writing to you because I believe it should be up to me-not the government-to make nutritional choices for my family.

A limit on beverage sizes will not limit consumption; it will only limit personal choice.

Please ask your colleagues at the Department of Health to stop the proposal to ban beverages over 16 ounces.

Sincerely,

Roberta O'Hanlon
3 Moody Pl
Staten Island, NY 10310

----- Original Message -----

From: Kristie Contreras [mailto:kristkat@verizon.net]
Sent: Monday, July 23, 2012 07:40 PM
To: Rose, Deborah

"Keeping Constituents First"

Subject: A ban on beverages over 16 ounces won't make New Yorkers healthier.

Dear Councilmember Rose,

I believe education, overall diet, and exercise determine the health of an individual.

I also believe obesity cannot-and should not-be solved through a discriminatory ban on a single product.

These beverage restrictions only serve as an illustration of government overreach.

On behalf of New Yorkers like me, please ask your colleagues at the Department of Health to reject this measure.

Sincerely,

Kristie Contreras
36 Westcott Blvd
Staten Island, NY 10314

----- Original Message -----

From: ARLENE ARUTA [<mailto:aaruta@aol.com>]

Sent: Sunday, July 22, 2012 11:04 AM

To: Rose, Deborah

Subject: Draw the Line

Dear Councilmember Rose,

Today, it's mandating the size of my beverage; tomorrow it will be the size of my pizza, the number of scoops in my ice cream sundae, or the number of ounces in my New York strip.

I urge you to help draw the line.

Enough is enough. Please ask your colleagues at the Department of Health to stop the proposal to ban beverages over 16 ounces.

Sincerely,

ARLENE ARUTA
14 Levit Ave
Staten Island, NY 10314

----- Original Message -----

From: Lorraine Datello [<mailto:poohroony@aol.com>]

Sent: Saturday, July 21, 2012 11:38 AM

To: Rose, Deborah

Subject: Bloomberg ban on large sugary drinks

The Mayor has no right to force businesses to sell a certain size drink. He also has no right to pick the businesses that can and cannot sell oversized drinks. Voters need to wake up. We are a democratic society and we need to keep that right. People should be responsible for themselves and what they eat and drink. He needs to get his priorities straight. Most likely he's

not getting any kickbacks from the "soda commission". I would think that someone who drinks an oversized soda is less threatening to those around them than a person who excessively drinks alcohol.

Thank you, Lorraine (water drinker)

200 Total Respondents

Question 1

37	Strongly Agree
14	Agree
12	Disagree
130	Strongly Disagree
7	No Response
18.50%	Strongly Agree
7.00%	Agree
6.00%	Disagree
65.00%	Strongly Disagree
3.50%	No Response

Chart Data

18.50% Strongly Agree
7.00% Agree
6.00% Disagree
65.00% Strongly Disagree
3.50% No Response

Question 2

173	Completely Understand
16	Somewhat Understand
7	I don't Understand
4	No Response
86.50%	Completely Understand
8.00%	Somewhat Understand
3.50%	I don't Understand
2.00%	No Response

Chart Data

86.50%
8.00%
3.50%
2.00%

Question 3

100	Yes
97	No
3	No Response
50.00%	Yes
48.50%	No
1.50%	No Response

Chart Data

50.00%
48.50%
1.50%

137 respondents identify as small business

68.50% of respondents small business

Question 1

106 no monetary impact

30 monetary Impact

77.37% no monetary impact

21.90% monetary Impact

Chart

77.37%

21.90%

Question 2

29 Negative Impact

1 Positive Impact

104 No Answer

96.67% Negative Impact

3.33% Positive Impact

Chart

96.67%

3.33%

Question 3

16 Extremely Satisfied

17 Satisfied

22 Dissatisfied

70 Extremely Dissatisfied

12 No Response

11.68% Extremely Satisfied

12.41% Satisfied

16.06% Dissatisfied

51.09% Extremely Dissatisfied

8.76% No response

Chart

11.68%

12.41%

16.06%

51.09%

8.76%

07-23-2012

N.Y.C. - Dept of Health

To whom it may concern:

I have just received your notice concerning the proposed rule for soft drinks.

I am so busy I couldn't wait to get home so I could print my comments. Had I received the notice earlier I would have made it my business to speak at the hearing.

The mayor should not be able to dictate what size a soft drink can be. If he actually took time to check he would have found that it is cheaper for a family of four to eat out in a fast food restaurant than to purchase the ingredients for a proper meal and then take them home and prepare a proper meal. Knowing what food cost at a wholesaler I get sticker shock when I go shopping for food for my personal consumption.

The solution is not in eliminating the size of a beverage but to find a way for a family to eat a healthy meal AT HOME at an affordable price.

Sincerely,


JEREMY'S ALE HOUSE STILL, INC.



July 24, 2012

NYC Department of Health and
Mental Hygiene Board of Health
Office of the Secretary of the Board
42-09 28th Street, 14 floor, Room 14-15, Box 31
Long Island City, NY 11101

To the New York City Board of Health:

Healthfirst is a not-for-profit health insurance plan that coordinates and pays for the care of close to 600,000 people in New York City. We strongly support Mayor Michael Bloomberg's initiative to limit the portion size of single serve sugary drinks sold at public establishments. We see both the human and financial costs of obesity on a daily basis – the compromised health and well-being of individuals, the terrible toll that diseases like diabetes take on individuals as well as their families, and the impediments to normal life suffered by obese individuals. Treating these conditions is expensive – an entire health care industry is growing up to treat obesity as well as obesity-related illnesses. And the call for obesity-related treatment is not limited to acute medical care; obese people who otherwise need long term care services at home, for example, need more home health aide support if they are obese because they have greater difficulty managing basic activities of daily living than their non-obese counterparts.

We and our primary care network are particularly alarmed at the rapid and increasing incidence of obesity in children. For this reason, Healthfirst is particularly supportive of the portion size proposal. Children are at risk of becoming obese and bearing the scourge of diabetes and related illnesses for their entire lives and society should do whatever it can to help them avoid this fate.

The health care costs related to obesity are staggering and are borne by the entire public in one way or another – through taxpayer-supported health insurance programs and direct support of building bariatric surgery suites and new obesity treatment centers, for example. At a time when dollars for public programs are more and more scarce, it is important to remember that funding spent in one area is not available to spend in others. To the extent we must spend more on the health-related consequences of obesity, for example, there is less to spend on primary care, affordable health insurance, education, and public transportation. We all pay for the health consequences of obesity.

The Mayor's initiative aims at the root cause of the problem by trying to reduce the incidence of obesity in the first place. It is an excellent start. We hope that New York City seizes the opportunity to lead the way through this non-coercive step that introduces some gentle reminders about portion control to consumers drinking sugary beverages.

Sincerely,

Pat Wang
President and CEO

2012 JUL 27 AM 11:45
RECEIVED
NYC DEPT OF HEALTH
OFFICE OF THE SECRETARY OF THE BOARD

WASHINGTON LEGAL FOUNDATION

2009 MASSACHUSETTS AVENUE, N.W.

WASHINGTON, D. C. 20036

202 588-0302

www.wlf.org

July 23, 2012

New York City Department of Health and Mental Hygiene
Board of Health
Office of the Secretary to the Board
Attn: Rena Bryant
2 Gotham Center, 14th Floor, Room 14-15, Box 31
Long Island City, NY 11101-4132

Re: Comments on the Proposed Amendment of Article 81 (Food Preparation and Food Establishments) of the New York City Health Code, found in Title 24 of the Rules of the City of New York

Dear Ms. Bryant:

The Washington Legal Foundation (WLF) welcomes the opportunity to offer its views on the Proposed Amendment of Article 81 regarding the maximum size of sugary drinks and self-service beverage cups sold and offered in food service establishments. WLF shares the New York City Department of Health and Mental Hygiene's (DOHMH) concern regarding the risk factors associated with obesity and the increase in obesity levels in the United States. WLF appreciates the efforts of DOHMH and the Board of Health in considering options to reduce the level of obesity among New Yorkers. Although WLF commends DOHMH and the Board of Health for its initiative in seeking ways to reduce the obesity levels of the citizens of New York City, we have serious concerns about the proposed amendments.

WLF urges the Board of Health to carefully contemplate the economic and social impact of such an amendment on the citizens and businesses of, and visitors to, New York City. The proposed amendment will negatively impact consumers in New York City by reducing available drink size options and by requiring them to purchase multiple drinks to achieve the same quantities larger than 16 ounces that are available in New York City today.

Furthermore, the proposed amendment is certain to adversely impact businesses that are regulated by the New York State Department of Health (NYSDOH). Such businesses will be forced to comply with the proposed amendment. Competitors such as convenience stores and grocery stores that are regulated by the New York State Department of Agriculture and Markets

(NYSDOA) and that sell the same beverages included in the proposed amendment will be free to continue to sell the prohibited products.¹

In addition to the adverse economic impacts that will likely result from the proposed amendment, there are substantial public policy factors such as consumer choice and individual liberty that should be carefully weighed. Furthermore, the Board of Health should carefully review all available scientific data regarding the correlation between “sugary drinks” and obesity to determine whether there is credible scientific evidence that the proposed amendment will achieve the stated goal of reducing obesity. The Board of Health should also consider whether the desired results can even be effectively tracked and measured.

Because there are important economic and social concerns in addition to health concerns, WLF questions whether the Board of Health has the authority under New York law to pass such a resolution without the assistance of the democratically-elected legislative body. WLF believes that under the important separation of powers provisions of New York law, New York City’s legislative body, not the Board of Health, is best positioned to consider, weigh, and determine various options to address obesity, including any proposed legislation.

WLF encourages DOHMH and the Board of Health to consider whether the proposed amendment is a rational way to achieve the stated goal of reducing obesity among New York City residents since: (a) not all establishments that provide self-service “sugary” drinks in cups or containers larger than 16 ounces are included in the Proposed Ban; (b) consumers will have the option to purchase two drinks to equal more than 16 ounces; (c) consumers may still receive refills in an amount greater than 16 ounces; (d) consumers may purchase beverages with similar sugar content (such as milkshakes and alcohol) that are not included in the amendment; and (e) consumers may still add any amount of sugar or other sweetener they desire.

WLF shares the Board of Health’s goal of drawing attention to and addressing the problem of obesity. WLF, however, believes that New York City can implement various ideas and programs that will more effectively reduce the obesity level of New Yorkers and that do so in a less intrusive and restrictive impact on consumers and businesses than the proposed amendment.

I. Interests of Washington Legal Foundation

WLF is a national public interest law and policy center located in Washington, D.C. WLF regularly appears before federal and state courts and administrative agencies to preserve and defend free market principles, a limited and accountable government, and individual and

¹ The Memorandum of Understanding (MOU) between the NYSDOH and the NYSDOA was amended and executed by the Agencies’ Commissioners effective September 20, 2010. Pursuant to the MOU, the NYSDOH is responsible for the “inspection and regulation of places where food is consumed on the premises or sold ready-to-eat for off-premises consumption including the site at which individual portions are provided” including, without limitation, restaurants, cafes, coffee shops, and cafeterias. The NYSDOA is responsible for the “inspection and regulation of places where food is processed or manufactured, food warehouses, wholesale food distributors and retail food stores” including, without limitation, food stores, convenience food plants, and delicatessens with food service less than 50% of annual sales.

business liberties. It devotes a substantial portion of its resources to defending the rights of individuals and businesses to go about their affairs without undue interference from government regulators.

WLF believes in individual freedom of choice and that paternalism towards adult consumers is rarely, if ever, warranted even when agencies such as DOHMH and the Board of Health desire to adopt resolutions for the noble intention of improving the health of its citizens. WLF urges governments--including municipal governments--to trust in the ability of consumers who receive truthful information to make decisions they believe are in their best interests. When adult consumers are provided truthful, health-related information and make decisions based on such information, individuals are accepting personal responsibility and society as a whole benefits. WLF suggests that the Board of Health respect the intelligence of its citizens to make the choices right for them when provided with truthful information.

II. Purposes of the Proposed Amendment

DOHMH identified a number of important reasons to justify a ban on an adult's freedom to choose. The Statement of Basis and Purpose in the above-referenced Notice of Public Hearing (Notice of Public Hearing) stated that more than half of New York City adults (58%) are now overweight or obese and more than 20% of the City's public school children (K-8) are obese.

To address the obesity epidemic among New York City's residents, DOHMH proposes that the Board of Health amend Article 81 of the Health Code, related to the maximum size of sugary drinks² and self-service beverage cups sold and offered in "food service establishments."³ According to the proposed amendment, "[a] food service establishment may not sell or offer to sell a sugary drink in a cup or container that is able to contain more than 16 fluid ounces" and "[a] food service establishment may not sell or provide to any customer a self-service cup or container that is able to contain more than 16 fluid ounces" (collectively, the "Proposed Ban").

According to the Notice of Public Hearing, "a food service establishment determined to have violated this section will be subject to a fine of no more than two hundred dollars for each violation and no more than one violation of this section may be cited at each inspection of a food service establishment."

² In the proposed amendment, a "sugary drink" is defined as "a carbonated or non-carbonated beverage that: (A) is non-alcoholic; (B) is sweetened by the manufacturer or establishment with sugar or another caloric sweetener; (C) has greater than 25 calories per 8 fluid ounces of beverage; and (D) does not contain more than 50 percent of milk or milk substitute by volume as an ingredient."

³ In Article 81 (Food Preparation and Food Establishments) of Title 24 Department of Health of the Official Rules of the City of New York a "food service establishment" is defined as "a place where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle."

http://www.nyc.gov/html/doh/downloads/pdf/rats/article_81.pdf last visited on July 20, 2012.

III. Separation of Powers

While WLF appreciates the role the Board of Health plays in improving the health of New Yorkers, we believe the board will likely exceed its administrative authority if it adopts the Proposed Ban. The Board of Health is granted broad powers pursuant to N.Y.C. Charter § 558(b), which provides that “[t]he board of health from time to time may add to and alter, amend or repeal any part of the health code, and may therein publish additional provisions for security of life and health in the city and confer additional powers on the department not inconsistent with the constitution, laws of this state or this charter.”

The separation of powers doctrine is clearly embodied in the New York State Constitution where it mandates that the “legislative power of this State shall be vested in the Senate and the Assembly.” N.Y. Const., Art. III, § 1. Further, Section 21 of the New York City Charter provides that “[t]here shall be a council which shall be the legislative body of the city” and that the legislative power is vested with the council. N.Y.C. Charter § 21. Section 21 additionally provides that “[a]ny enumeration of powers in this charter shall not be held to limit the legislative power of the council, except as specifically provided in this charter.”

In addition to such separation of powers provisions, guidance provided in *Boreali v. Axelrod* regarding the delegation of authority between the Board of Health and the city council is relevant to the consideration of the Proposed Ban. See *Boreali v. Axelrod*, 71 N.Y.2d 1, 517 N.E.2d 1350 (1987). The regulations at issue in *Boreali* were invalidated because the public health council was found to have overstepped its bounds and exercised legislative authority in that it:

- (a) weighed “economic and social concerns” in addition to health concerns;
- (b) “wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance”;
- (c) “acted in an area in which the [New York] Legislature had repeatedly tried-and failed-to reach agreement in the face of substantial public debate”; and
- (d) did not exercise any special expertise or technical competence in the field of health in drafting the “simple code” at issue. *Boreali*, 71 N.Y.2d at 8-14, 517 N.E.2d at 1353-57.

Importantly, one federal court has relied on only one of the *Boreali* factors in striking down proposed regulations. *Nassau Bowling Proprietors Ass’n v. County of Nassau*, 965 F. Supp. 376, 379-380 (E.D.N.Y. 1977). The court found that the board considered factors other than health factors and stated that although the board had the authority to regulate health matters, it was “improper” to weigh and balance other “significant concerns not within the ambit of authority delegated to the Board.” *Nassau Bowling*, 965 F. Supp. at 380. Economic and social concerns should be evaluated in addition to health concerns to effectively analyze the impact of the Proposed Ban. As a result, the Board of Health will likely not be able to effectively create and implement such a ban without running afoul of the separation of powers limitations on its authority.

A. Weighing Economic and Social Concerns

Like the regulations at issue in *Boreali*, the Proposed Ban on large sugary beverages obviously implicates important economic and social concerns. Such a ban will clearly have an adverse economic impact on those businesses that rely on the sale of such products, as well as the producers and distributors of such products. Vendors have a right to earn a living from the production and sale of legal products, especially when those products can be legally purchased in smaller sizes.

Furthermore, the Proposed Ban will negatively impact manufacturers, distributors, and retailers of the prohibited *cups and containers*. The Proposed Ban specifies that “[a] food service establishment may not sell or provide to any customer a self-service cup *or container that is able to contain more than 16 fluid ounces.*” (emphasis added) This definition is overinclusive because it arguably restricts the ability of coffee shops, cafes, and other NYSDOH-regulated establishments to sell, among other containers, coffee pots, thermoses, and tea pots that are “able to contain more than 16 fluid ounces.” Many retailers now rely on the significant revenues associated with the sales of such equipment, accessories, and drinkware. The resulting loss of sales is certain to adversely impact the revenues of such manufacturers, distributors, and retailers as well as the revenues of New York City.

Manufacturers, distributors, and retailers of self-service cups will also be adversely affected. Although there might be an increase in the purchase of 16-ounce and smaller cups and containers, there is certain to be a loss of sales of cups and containers that hold more than 16 ounces. Many retailers offer a discount to consumers who purchase a reusable cup and return to the retailer for refills, which also benefits the environment. Those consumers who have previously purchased larger reusable cups will now be forced to purchase a 16-ounce or smaller reusable cup.

Consumers will be further impacted by the Proposed Ban because they will have to purchase two smaller drinks to receive a drink larger than 16 ounces. This will increase a consumer’s total costs of purchasing self-service drinks. Moreover, consumers who purchase family meals that are available at some restaurants will no longer be able to receive the family-size (typically gallon) drinks that are usually offered.

The Proposed Ban may also reduce tourism in New York City. Given the state of the economy, families are more carefully considering total costs of holidays and vacations and some families may choose to visit cities other than New York City as they consider the possible increase in expenses associated with having to purchase more drinks.

The Proposed Ban will affect similarly-situated retailers and producers in an unfair fashion and likely put NYSDOH-regulated food establishments at a competitive disadvantage. Restaurants, coffee shops, and other food service establishments under the authority of NYSDOH will be affected by the Proposed Ban. Convenience stores, grocery store, and other businesses that sell self-service foods and beverages, however, are excluded from the Proposed

Ban because they are regulated by the NYSDOA, and will remain free to sell the drinks included in the Proposed Ban. Additionally, the Proposed Ban does not apply to dairy-based drinks or alcoholic beverages even though such drinks likely contain more sugar than soft drinks, thus having a disparate impact on producers of similar products.

As evidenced by the state constitution, social concerns should also be considered in weighing the impact of the Proposed Ban. New York has historically championed individual freedoms, and the New York State Constitution states that “[e]very citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right.” *N.Y. Const. art. I, § 8*. Because of such guarantees, New York City will certainly want to consider the impact of the Proposed Ban on individual choice and liberty.

An individual’s freedom to exercise personal choice bolsters human dignity, responsibility, and fairness. Liberty underpins the American way of life and the U.S. Constitution—it is part of the American psyche. While WLF does not view the freedom to choose what one eats as a right equivalent to that of free speech, the freedom to choose what one eats has an immediate influence on both one’s mental and physical quality of life. Preparing, serving, and eating food has important cultural and religious dimensions. While some serious threats to public health necessitate minimal restrictions on personal liberty such as those threats associated with products that scientists agree are bad in any quantity, soda and other drinks included in the Proposed Ban are not such products. In light of the individual liberty at stake, the Proposed Ban and the associated restrictions are not justified.

Because the weighing of “economic and social concerns” is a legislative not administrative function, the Board will have exceeded its authority by enacting the Proposed Ban. Such concerns, as *Boreali* makes clear, are the exclusive purview of the New York City Council.

B. Writing on a Clean Slate and Encroaching on Legislative Responsibilities

With regard to the second prong of the *Boreali* test, if the Board of Health passes the Proposed Ban it will not be “merely filling in the details of broad legislation describing the over-all policies to be implemented” but will rather be writing “on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance.” *Boreali*, 71 N.Y.2d at 13, 517 N.E.2d at 1356. Because there has been increasing focus on obesity and the methods that may be used to address such a society-wide health problem, the legislative body should be tasked with resolving such a difficult social, health, and economic problem by weighing and debating various options and costs. WLF agrees with the opinion in *Boreali* that “[m]anifestly, it is the province of the people’s elected representatives...to resolve difficult social problems by making choices among competing ends.” *Boreali*, 71 N.Y.2d at 13, 517 N.E.2d at 1356.

C. Exercising No Special Health Expertise

Although obesity is certainly a health concern, it does not appear that any special expertise or technical competence in the field of health was exercised by the Board of Health in developing the details of the Proposed Ban. In light of the fact that drinks with sugar--such as alcohol and milkshakes--are not included in the proposal, that consumers may get multiple refills or purchase multiple drinks, and the implausibility of the Proposed Ban's ability to reduce obesity rates, it appears that the selection of drinks was not based on health and science but was instead arbitrary.

For the reasons discussed above, the New York City Council is the appropriate body to consider potential options to address the obesity issue in New York City. If the *Boreali* test is applied to the Proposed Ban, the Board of Health will likely be found to have exceeded its authority.

IV. Irrational Means to Reduce Obesity

The Proposed Ban is not a rational way to reduce the obesity of New York City citizens. While the Proposed Ban may negatively affect sales to consumers, a consumer has the option to purchase two drinks to equal more than 16 ounces and, thereby, circumvent the Board of Health's goal. In addition, an establishment subject to the Proposed Ban may be located next to a NYSDOA-regulated establishment that is not subject to the Proposed Ban. It does not seem rational for a consumer to be prohibited from purchasing a 20-ounce sugary drink at Starbucks or Subway but walk potentially next door to a 7-Eleven or other NYSDOA-controlled establishment and purchase a similar 20-ounce drink. Nor does it make much sense to restrict the purchase of some sugary drinks while allowing the purchase of other sugary drinks such as milk-based products and alcohol in larger amounts.

The validity of the Proposed Ban hinges on its effectiveness, but various studies challenge the link between soda consumption and obesity, as well as the ability of bans or taxes to decrease consumption. Any product ban should be squarely rooted in science and likely to solve the problem being addressed.

First, soda consumption has steadily declined--sugar-sweetened beverages make up only 7% of the average person's caloric intake--while obesity has steadily increased. Just last year, Diet Coke became the second most popular carbonated beverage in the United States. This alone should call into question the hyperbolic characterizations of soda. Scientific studies further undermine the contention that soda is responsible for the obesity epidemic. A study in the *American Journal of Clinical Nutrition* found "no association between sugar-sweetened beverage consumption, juice consumption, and adolescent weight gain over a 5-year period."⁴

Even if it is scientifically determined that soda consumption is largely responsible for obesity, it is unclear that a ban on large portions of such drinks, which effectively acts as a tax on

⁴ Vanselow MS, Pereira MA, Neumark-Sztainer D, Ratz SK. Adolescent beverage habits and changes in weight over time: findings from Project EAT. *American Journal of Clinical Nutrition* 2009;90:1489-1495.

marginal consumption, will ameliorate the problem. A study by Van Hook and Altman found that children with access to junk food (e.g., soft drinks, candy bars, and potato chips) at school were no heavier than those without.⁵ Furthermore, a 2010 study funded by the Robert Wood Johnson Foundation found that even a 40% soda tax had no statistically significant effect on the weight of those in the lowest income quartile.⁶ Instructively, tax hikes on alcohol and tobacco have the largest effect on the consumption of light users, rather than heavy users.⁷

These results are unsurprising given the likely human response to soda bans: sweet-toothed individuals will find another sweet product to satisfy their sugar fix. As an article from the *American Journal of Preventative Medicine* stated, “taxes on soft drinks may reduce soda consumption but increase the consumption of other beverages high in sugar and calories.”⁸ Not only may individuals turn to sugary substitutes in beverage form; restraint from soda consumption fosters the notion that “because they stopped drinking Coke, they are free to eat more cake.”⁹ The *Journal of Public Economics* found that a six-calorie reduction in calories consumed from soda was accompanied by an eight-calorie increase in milk consumption, and a two-calorie increase in juice drink consumption for young people, age 3-18.¹⁰

Behavioral economics suggests that most obese individuals know they are heavy, understand the nutritional value of the foods they eat, and have strong incentives to correct their behavior.¹¹ Bans are unlikely to change this very human behavior unless most unhealthy options are banned.

Human behavior in tandem with the loopholes included in the Proposed Ban call into question the effectiveness of a large sugary beverage ban. Such factors will undermine the ability of the amendment to effectuate change in consumption or obesity rates. Because there is no reliable and credible evidence that the Proposed Ban will reduce obesity, there can be no justification for imposing restrictions on individual freedom of choice.

V. Other Policy Considerations

The Proposed Ban, like all sin taxes, will act as a regressive tax that hurts the poorest segments of society the most. Poorer dietary habits tend to correlate to lower incomes, and thus taxes on “unhealthy” products tend to disproportionately affect lower-income households. Further, sin taxes are associated with other negative economic consequences. By design, for sin

⁵ Van Hook J, Altman CE. Competitive Food Sales in Schools and Childhood Obesity: A Longitudinal Study. *Sociology of Education* 2012;85(1):23-39.

⁶ Finkelstein EA, Zhen C, Nonnemaker J, Todd JE. Impact of Targeted Beverage Taxes on Higher- and Lower-Income Households. *Archives of Internal Medicine* 2010;170(22):2028-2034.

⁷ Marlow ML, Abdulkadirov S. Can Behavior Economics Combat Obesity? *Regulation Magazine* 2012; 14-18.

⁸ Finkelstein E, French S, Variyam JN, Haines PS. Pros and cons of proposed interventions to promote healthy eating. *American Journal of Preventative Medicine* 2004; 27(3):163-171.

⁹ Klick J, Helland EA. Slim Odds: Empirical studies provide little evidence that soda taxes would shrink Americans' waistlines. *Regulation Magazine* 2011; 20-23.

¹⁰ Fletcher JM, Frisvold DE, Tefft N. The effects of soft drink taxes on child and adolescent consumption and weight outcomes. *Journal of Public Economics* 2010; 94:967-974.

¹¹ Marlow ML, Abdulkadirov S. Can Behavior Economics Combat Obesity? *Regulation Magazine* 2012; 14-18.

taxes to be effective they must decrease consumption of the targeted product. In doing so, sin taxes affect the jobs and livelihoods of those in the affected industries.

The threat to choice that the Proposed Ban presents seems minimal when considered in the context of just one product; but it sets a precedent with language that justifies bans on a panoply of other products that is dangerous. The reasons for banning large sugary beverages are indistinguishable from the reasons that would justify bans on alcohol, red meat, hot dogs, white bread, French fries, cookies, etc. All of these products are considered detrimental to one's health, and almost any product, with adequate misuse, could pose a health danger. There will be times, however, where reasonable people will disagree on the "badness" of a given food, and creating a precedent for food and beverage bans is especially dangerous where the link to obesity is suspect.

It has been reported that the Board of Health has already considered further bans on popcorn and milkshakes. It is easy to see how one ban can easily lead to another, and another, based on where disfavor lies at any given moment. It is foreseeable that an array of products will be taken from the shelves, and consumers' dietary choices will be heavily reduced. Eliminating disfavored products from consumers' selection of choices takes away from life's simple pleasures, such as a night out at the movies with family or friends, infrequent indulgences, or childhood associations with particular foods or beverages. Micro-managing the population's diet takes away from the joy of life.

VI. Less Intrusive, More Effective Means to Battle Obesity

A free society benefits when individuals are empowered with the freedom to make educated choices. Alternative means are available to New York City that would enhance rather than stifle individual choice. Public education efforts enable individuals to make informed food and beverage choices while preserving that right to choose. Such measures are far more consistent with our nation's values than an out-right ban. Such educational efforts could take the form of healthy lifestyle campaigns in the media or in schools, and consist of fact-based information about the causes and dangers of obesity. Schools, who oversee the most vulnerable segment of the population, could increase health and physical education programs, and provide outreach to parents. Such measures are consistent with schools' grant of authority.

Alternatively, the municipal government can create opportunities for individuals to make healthy lifestyle choices. For instance, more parks would provide more opportunity for physical and recreational activity. More drinking fountains would provide fresh water as an alternative to sugary beverages. Bike share programs promote physical fitness while providing the added benefit of alternative modes of transportation. Many of these efforts will be community based, so as to suit the needs, qualities, and landscapes of the local population. These measures enable individuals to make healthy choices of their own volition and are better suited to solving the obesity epidemic than a one-size-fits-all approach.

New York City can incentivize all food and beverage outlets to provide healthier options for consumers. New York City can also incentivize its citizens to eat healthier and lose weight.

Comments on Proposed Amendment of Article 81
July 23, 2012

Many reading programs implemented across the nation's libraries incentivize children to read during the summer months. Many times the best results are achieved with the proverbial carrot rather than the stick.

WLF applauds the Department of Health and the Board of Health for seeking to improve the health of New York City citizens. WLF appreciates the opportunity to provide the Board of Health our feedback and views on such an important topic. We encourage the board to carefully consider the negative economic, social, and behavioral impacts that are likely to result from the Proposed Ban.

WLF believes the Board of Health can positively impact the obesity levels of New Yorkers through less restrictive means such as education, exercise programs targeting at adults as well as children, facilities for such programs, and healthy school lunch options.

Respectfully submitted,

/s/ Lori L. Jenkins

Lori L. Jenkins
Executive Vice President and
General Counsel
Washington Legal Foundation

/s/ Anastasia P. Killian

Anastasia P. Killian
Director of Policy and Outreach
Washington Legal Foundation