

POLICY

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THE BIG APPLE'S FIGHT OVER CALORIE CONTENT

The New York City Health Department sought to address the obesity epidemic by requiring certain restaurants to publicize nutritional information. The federal Nutrition Labeling and Education Act of 1989 mandated the inclusion of nutritional information on all packaged foods, but the NYC Health Department undertook a large venture to further require calorie posting by major fast-food restaurants. The rationale: Not only might consumers choose lower-calorie items, but the restaurants might respond by offering items with lower calories on their menus.

Of note, the authors here provide firsthand knowledge and an organized approach to how they drafted the proposed rule and how they maneuvered the politics of its approval. Each are affiliated with the NYC Health Department - the health commissioner, the assistant commissioner, the deputy commissioner, a special assistant, and a special advisor.

Key questions considered were as follows:

- Restaurants to be included were to have high customer traffic and were to have been most associated with obesity. Chain restaurants have standardized recipes and menus, as well as standard sources for ingredients which can provide reliable measurements of calories.
- The caloric content of food was the single most important piece of information for consumers when focusing on the problem of obesity. Other information might have been included, but the authors wanted the most bang-for-their-buck.
- The caloric information was to be placed such that it would be visible at the time of the purchasing decision - not on napkins, in pamphlets, or on a website. Location as well as size and type-face of the information was specified.

- Combination meals which are heavily promoted as selection opportunities at a cheaper price were to have calorie ranges posted, as it may be difficult to post exact information for the variety of options. Initially the restaurant industry objected on multiple grounds. They cited that it would be too difficult to identify standard caloric content of varying foods, and that laboratory testing of the foods would be too expensive. They also argued on legal grounds that the federal legislation concerning packaged foods preempted any state or local governments from regulating this area. Thirdly, they argued that the menu-labeling rule violated restaurants' free-speech



Kameron Matthews, MD, Esq.

has contributed to Policy Prescriptions since 2008. She completed her undergraduate degree at Duke University in Public Policy Studies. Dr. Matthews earned her medical degree from Johns Hopkins University. During medical school, Dr. Matthews also obtained a law degree at the University of Chicago. She is completing a residency in Family Medicine at the University of Illinois at Chicago and serves as Chief Resident in 2009-2010.



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rights, citing that the caloric content information was protected as commercial speech.

The courts disagreed with each of these arguments. The federal legislation did not preempt the NYC Health department rule as it currently was drafted. The language concerning the caloric information was not commercial speech, but instead factual information that does not offend core First Amendment values of promoting exchange of information or protecting individual liberty.

The authors from the NYC Health Department recognized several necessary steps that were taken for the success of the new rule. First, it was unlikely that restaurants would post caloric information voluntarily. Second the rule had to have

flexibility in different situations while not creating opportunities for restaurants to avoid posting information prominently or meaningfully. A previous version of this rule had been proposed, but was unsuccessful for this very point. The prior proposed rule allowed for restaurants to propose alternate ways for presenting caloric information; however, the advancement of the rule became hindered when the Health Department then had to entertain a wide range of discussions pertaining to acceptability of the alternate designs. The Health Department therefore communicated regularly with the restaurant industry for their input on the final rule in order to assure both positive public health outcomes and practical implementation of the postings. Lastly,

the Health Department recognized that the effort was a product of an intense collaboration between experts in chronic disease prevention, environmental health, nutrition, public health law, and communications. Multiple third parties provided input including the American Medical Association, the American Diabetes Association, the American Public Health Association, the National League of Cities, and the Food and Drug Administration, all in support of the Health Department's rule. However, without the recognition of the legal bases of the restaurants' court challenges, the rule could have had easily been refuted by the restaurant lawyers on purely legal

Health Affairs. 2009; 28 (6): w1098-1109.

The authors provide an excellent summary on the incremental nature of policy-making and the necessary collaboration with industries outside of the public health arena. As public health agencies seek to address dire health concerns, they must gain an understanding of the political and legal nature of the system which they might come up against. An additional example is the ever-growing expansion of tobacco use limitation throughout different cities and states. Admittedly, there is not data as of

yet for the success of the menu labeling regulation; however the success of the rule-making and its implementation lies in the subsequent activity of other locales and the federal government in making menu-labeling adopted more widely.

This example provides insight into the level of compromise that should be sought. By requiring calories as the sole information to be posted, the authors chose to de-emphasize the importance of sodium and fat content for its impact on hypertension and

hyperlipidemia as consequences and/or confounders of obesity. Although the public health and nutrition specialists were most likely seeking full disclosure of all nutritional information, the Health Department recognized the backlash that the restaurant industry would have displayed. Though not disclosed in this article, it can be posited that this was a political compromise. By seeking change in an incremental fashion, the Health Department left room for future change.