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Menu Labeling: The Unintended Consequences to the Consumer

ELLEN A. BLACK*

I. INTRODUCTION

Why are Americans, along with the rest of the most populous nations, more overweight than twenty or thirty years ago?¹ Most nutritionists and scientists agree that the answer is complex and multifaceted, with genetics, exercise, and diet all playing at least a partial role.² Americans, for the last thirty years, have been reportedly eating out at restaurants more frequently than they have been eating at home; as a result, the restaurant industry has been blamed, in part, for the rise in obesity, based upon the presumption that more calories are consumed at restaurants than at home.³ Yet determining the underlying causes of obesity is not simple; thus, the proposed solutions to combat the obesity problem have been numerous and wide-ranging.⁴ Indeed, how to tackle the obesity crisis has become a national debate, with proposed solutions originating from both public and private entities. One proposed government solution that has emerged from the obesity debate is menu labeling, which requires certain eating places to post nutrition information on their menus.⁵

The theory behind menu labeling presupposes that consumers lack information about the nutritional content of the food they consume when eating away from home, and that those consumers desire more information about their food when visiting a restaurant.⁶ Thus, with menu labeling, consumers become armed with knowledge of the nutritional content of their food, and with this knowledge consumers will choose healthier food

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¹ See CTRS. FOR DISEASE CONTROL & PREVENTION, FACTS ABOUT OBESITY IN THE UNITED STATES, available at http://www.cdc.gov/pdf/facts_about_obesity_in_the_united_states.pdf (last visited Oct. 14, 2014); CTRS. FOR DISEASE CONTROL & PREVENTION, OBESITY AND OVERWEIGHT, available at <http://www.cdc.gov/nchs/fastats/obesity-overweight.htm> (last visited Oct. 14, 2014) (noting that the obesity rate in the United States from 2011–2012 was 35.1%); ORG. FOR ECON. CO-OPERATION & DEV., OBESITY UPDATE 2012, AT 1 (2012), available at <http://www.oecd.org/health/49716427.pdf> (finding obesity rates have doubled or tripled since 1980 and a majority of the population is obese in 19 of the 34 countries in the OECD).

² See, e.g., Andrew J. Walley et al., *Genetics of Obesity and the Prediction of Risk for Health*, 15 HUM. MOLECULAR GENETICS R124, R128 (2006), available at http://hmg.oxfordjournals.org/content/15/suppl_2/R124.full (analyzing the correlation between genetics and obesity); Marie-Pierre St-Onge et al., *Changes in Childhood Food Consumption Patterns: A Cause for Concern in Light of Increasing Body Weights*, 78 AM. J. CLINICAL NUTRITION 1068, 1069–70 (2003), available at <http://ajcn.nutrition.org/content/78/6/1068.full.pdf> (considering how diet, specifically fast food consumption, contributes to childhood obesity).

³ See RUDD CTR. FOR FOOD POL'Y & OBESITY, YALE UNIV., MENU LABELING IN CHAIN RESTAURANTS: OPPORTUNITY FOR PUBLIC POLICY 2 (2008), available at <http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddMenuLabelingReport2008.pdf>.

⁴ David G. Yosifon, *Legal Theoretic Inadequacy and Obesity Epidemic Analysis*, 15 GEO. MASON L. REV. 681, 683 (2008), available at <http://digitalcommons.law.scu.edu/facpubs/64> (“Because there is no single cause of the obesity epidemic, solutions to the problem are unlikely to be simple or singular in nature.”).

⁵ See *infra* Part II.

⁶ Michèle I. Banker, *I Saw the Sign: The New Federal Menu-Labeling Law and Lessons From Local Experience*, 65 FOOD & DRUG L.J. 901, 915–16 (2010) (discussing the arguments in support of the federal menu labeling law).

options over less healthy options.⁷ As consumers choose these healthier options, they will maintain a more appropriate body weight, thereby lowering the country's obesity rate.⁸ Another notion is that restaurants, knowing they must post the nutritional content on their menus, will seek to develop healthier food options and seek to satisfy consumers' desires for healthier food options.⁹ Thus, in theory, menu labeling appears to be one tool in the tool belt to help the nation make healthier choices.

Although the premise behind menu labeling is laudable, it may not fully consider how and why consumers make particular food choices and whether the menu labeling requirement will be effective at changing consumer behavior to ultimately lower the nation's obesity rate. If menu labeling is not effective, consumers may be faced with negative unintended consequences, such as higher food prices, with no correlative health benefit. This article seeks to fully examine the menu labeling law, its impact on consumer decisions, and the potential negative consequences that may result from the law. Part II of this article reviews the background of menu labeling, focusing on the requirements of the new menu labeling provision under the Affordable Care Act. Part III considers those municipalities with menu labeling laws and the studies that have been conducted to determine the effectiveness of their respective menu labeling requirements. Part IV analyzes the complexity of consumer behavior, with particular focus on how this behavior presents a significant hurdle to the impact of menu labeling. Part V contemplates the unintended consequences of the menu labeling law.

II. MENU LABELING BACKGROUND

The desire to inform consumers about the nutritional content of the foods they consume dates back to the Nutrition Labeling and Education Act of 1990 (NLEA).¹⁰ The NLEA required food manufacturers to place a nutrition label on the back of the foods they created in an effort to educate consumers about the content of their food.¹¹ However, the NLEA specifically exempted restaurants from having to comply with the law, thus arguably leaving restaurants unaccountable to their patrons for the healthiness of the foods served.¹² In response to this information vacuum, as early as 2003, legislation was introduced in the United States House of Representatives and the Senate that sought to require restaurants to comply with the NLEA to allow consumers to have more knowledge of the nutritional content of the foods they consume at restaurants; however, the proposed legislation was never enacted.¹³

In the meantime, some cities and states enacted laws requiring restaurants to include nutritional information on menus. For example, New York City was one of the first jurisdictions to consider the issue and enacted a menu labeling law in 2008.¹⁴ New York

⁷ *Id.* at 916–17 (discussing some of the empirical evidence that supports and refutes this theory).

⁸ *Id.*

⁹ *Id.* at 917.

¹⁰ Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 [hereinafter NLEA] (codified as amended in scattered sections of 21 U.S.C.).

¹¹ *Id.* § 2(a), 104 Stat. at 2353 (codified at 21 U.S.C. § 343(q)(1) (2012)).

¹² *Id.* § 2(a), 104 Stat. at 2355 (codified at 21 U.S.C. § 343(q)(5)(A)(i) (2012)).

¹³ Menu Education and Labeling Act, H.R. 3444, 108th Cong. (2003); Menu Education and Labeling Act, S. 2108, 108th Cong. (2004).

¹⁴ N.Y.C., N.Y., NEW YORK CITY HEALTH CODE tit. 24, art. 81, § 81.50 (2008). New York City's Department of Health and Mental Hygiene, Board of Health, had previously introduced a prior menu labeling law that was enacted on March 1, 2007. However, this prior version applied only to those restaurants that voluntarily chose to provide such information to consumers on their menus and menu boards. The New York State Restaurant Association successfully challenged this version, and the United States District Court for

City's menu labeling law required all restaurants in New York City with fifteen or more locations nationally that operated under the same name and offered the same food on their menus to comply with the law.¹⁵ But not all municipalities followed New York City's lead. For example, several states, including Alabama,¹⁶ Georgia,¹⁷ Ohio,¹⁸ Utah,¹⁹ and Tennessee,²⁰ passed legislation prohibiting or limiting their respective municipalities from enacting similar menu labeling requirements.²¹ These states enacted prohibitions against menu labeling for a couple of reasons. Primarily, the states were seeking to protect restaurants from a multitude of regulations from different municipalities within the same state.²² The difficulty restaurants would have faced if cities in the state required differing forms of menu labeling resonated with lawmakers, who took preemptive action to shield restaurants. States were also concerned about the costs associated with the menu labeling requirement, especially if different municipalities in the same state required dissimilar labeling obligations.²³

Based upon the perceived desire for a uniform, nationwide menu labeling law, Congress included Section 4205 within the Affordable Care Act (ACA), which was signed into law on March 23, 2010.²⁴ This section preempts the various state and local

the Southern District of New York found that the law was preempted by the federal Nutrition Labeling and Education Act. *See* N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 509 F. Supp. 2d 351, 363 (S.D.N.Y. 2007).

¹⁵ Tit. 24, § 81.50 (a)(1), (c).

¹⁶ ALA. CODE § 20-1-7(a) (2011) (“The subject matter of the regulation of nutrition labeling of food that is a menu item in restaurants, retail food establishments and vending machines is reserved to the Legislature and may be regulated only by an act of the Legislature of statewide application enacted after June 9, 2011.”).

¹⁷ GA. CODE ANN. § 26-2-373(a) (2011) (“[N]o county board of health or political subdivision of this state shall enact any ordinance or issue any rules and regulations pertaining to the provision of food nutrition information at food service establishments.”).

¹⁸ OHIO REV. CODE ANN. § 3717.53(b) (2014) (“The director of agriculture has sole and exclusive authority in this state to regulate the provision of food nutrition information and consumer incentive items at food service operations.”).

¹⁹ UTAH CODE ANN. § 10-8-44.5 (2009) (“A municipality may not regulate the dissemination of nutritional information or the content required to be placed on a menu, menu board, or food tag by a restaurant, eating establishment, or other food facility.”).

²⁰ TENN. CODE ANN. § 68-14-303(3) (2013). Tennessee's provision did not prohibit municipalities from requiring menu labeling, but instead provided that “[a] non-elected body of any municipality, county, or metropolitan government shall not enact any ordinance or issue any rule or regulation pertaining to the provision of food nutritional information or otherwise regulate menus at food service establishments.” *Id.* (emphasis added).

²¹ *See Stephanie Strom, Local Laws Fighting Fat Under Siege*, N.Y. TIMES (June 20, 2011), http://www.nytimes.com/2011/07/01/business/01obese.html?pagewanted=all&_r=0.

²² Heather May, *No Calorie Counts on Utah Menus*, SALT LAKE TRIB. (Feb. 19, 2009), http://www.sltrib.com/business/ci_11741787. Costs to local businesses were a concern of menu labeling, which according to the Utah Restaurant Association Executive Director could cost restaurants \$18,000. *Id.* The sponsor of the bill, Senator Howard Stephenson, emphasized consistency and felt that if there are regulations at all, they should be applied statewide. *Id.*

²³ *See Video of Rep. Susan Lynn Regarding a Bill Banning Non-Elected Boards from Requiring Nutrition Information on Menus*, TENN. GEN. ASSEMBLY (Feb. 8, 2010), <http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB1092&ga=106> (follow “Video Clips” tab hyperlink; then follow “Video” hyperlink for Feb. 8, 2010). During the Tennessee House of Representative's discussion concerning the menu labeling bill, Representative Susan Lynn, the sponsor of the bill that prohibited nonelected bodies from enacting menu labeling, emphasized the expense of possible regulations to both businesses and customers, particularly if the requirements vary. *Id.* She also voiced concern that listing calories on a menu has little connection to nutrition and there is no evidence that listing calories on menus actually has any effect on health. *Id.*

²⁴ Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573-76 (2010) (codified at 21 U.S.C. § 343(q)(5)(H) (2012)). Perhaps surprisingly, the National Restaurant Association (NRA) was in favor of Section 4205 of the ACA. The NRA had previously vehemently opposed prior menu labeling laws, but in the face of a myriad of state and local requirements that would be difficult, if

menu labeling laws and establishes federal labeling requirements for certain restaurants, similar food service facilities, and vending machines.²⁵ However, states and localities are not preempted from imposing menu labeling regulations on establishments that are not specifically covered by Section 4205.²⁶

According to Section 4205, “restaurants and similar food establishments” with twenty or more locations with the same name and offering the same menu items are required to comply with the menu labeling requirements.²⁷ The Food and Drug Administration’s (FDA’s) proposed menu labeling requirements define “restaurants or similar retail food establishments” as “an establishment that sells restaurant or restaurant-type food whose primary business activity is the sale of food to consumers.”²⁸ To determine whether an establishment’s “primary business activity” is the sale of food, the establishment must either “present[] itself as a restaurant, or greater than 50% of the establishment’s total floor area is used for the sale of food.”²⁹ But questions have arisen as to which restaurants or food establishments must comply with the menu labeling law.³⁰ According to the menu labeling requirements, “similar retail food establishments” must also provide menu labeling, but determining which establishments must comply is not clear-cut.³¹ The FDA Commissioner, Margaret Hamburg, has admitted that defining these similar retail food establishments has been extremely difficult:

Defining exactly what a . . . restaurant is [is] fairly straightforward; a restaurant-like establishment is a more complex challenge in our modern world of fast food stores and pizza delivery and the different kinds of models of in-grocery store cafes, etc. And that’s really where the greatest challenges have come and where we have gone through an extended process for putting out proposals, asking questions and seeking public comment and we are trying now to go through all of that and compile the issues and concerns and reflect those back in a final rule which we hope will be published very soon.³²

not impossible to follow, the NRA ultimately supported the federal mandate. See Letter from Dawn Sweeney, President & CEO, Nat’l Rest. Ass’n, to Margaret A. Hamburg, M.D., Comm’r, Food & Drug Admin. (July 5, 2011), available at http://www.restaurant.org/Downloads/PDFs/advocacy/20110705_ml_fda_sweeney.pdf.

²⁵ See 21 U.S.C. § 343(q)(5)(H) (2012).

²⁶ Thus, restaurants with twenty or fewer locations, though exempt from the federal menu labeling requirement, may still be subject to state and local menu labeling requirements if they do not voluntarily elect to comply. See *Guidance for Industry: Questions and Answers Regarding the Effect of Section 4205 of the Patient Protection and Affordable Care Act of 2010 on State and Local Menu and Vending Machine Labeling Laws*, FOOD & DRUG ADMIN. (Aug. 2010), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm223408.htm#C>.

²⁷ 21 U.S.C. § 343(q)(5)(H)(i).

²⁸ *Overview of FDA Proposed Labeling Requirements for Restaurants, Similar Retail Food Establishments and Vending Machines*, FOOD & DRUG ADMIN., <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm248732.htm> (last updated Apr. 24, 2013) [hereinafter FDA Overview].

²⁹ *Id.*

³⁰ See Nancy Huehnergarth, *Is the Obama Administration Allowing Industry to Delay Menu Labeling Implementation?*, THE HILL (MAY 28, 2013, 8:00 PM), <http://thehill.com/blogs/congress-blog/healthcare/302179-is-the-obama-administration-allowing-industry-to-delay-federal-menu-labeling-implementation> (“Lobbyists for the movie theater, convenience store and supermarket industries are also seeking exemptions, even though they sell large portion sizes of restaurant-style food that often contains more calories than people expect.”).

³¹ 21 U.S.C. § 343(q)(5)(H)(ii)(I)(aa) (2012).

³² *Washington Report: Senators Question FDA Commissioner on Menu Labeling*, NACS (APR. 19, 2013), <http://www.nacsonline.com/News/Daily/Pages/ND019131.aspx#.VBlziqOrF6M> (before shortening its name to NACS, this trade association was called the National Association of Convenience Stores).

In fact, grocery store and convenience store owners who technically fall within the ambit of the menu labeling law have voiced concern and outrage over the requirements.³³ According to Erik Lieberman, Regulatory Counsel for the Food Marketing Institute, the law will cost store owners a tremendous amount of money, resulting in “higher prices at the register” for consumers.³⁴

Additionally, according to the menu labeling law, restaurants and similar food establishments must include specific information in the required menu labels.³⁵ On the menu, adjacent to the name of the food item for sale, the restaurant must provide “the number of calories contained in the standard menu item, as usually prepared and offered for sale.”³⁶ The number of calories must be placed clearly and prominently on all menus and menu boards.³⁷ Going even further, the menu labeling law even covers combination meals, since many restaurants, especially fast food restaurants, offer value meals to consumers.³⁸ The law allows the Secretary of Health and Human Services to establish regulations governing combination meals; the proposed regulations permit restaurants to state the range of possible calorie counts for different meal combinations.³⁹

In addition to the calorie content requirement, the law also requires restaurants to include “a succinct statement concerning suggested daily caloric intake, as specified by the Secretary by regulation and posted prominently on the menu and designed to enable the public to understand, in the context of a total daily diet, the significance of caloric information that is provided on the menu.”⁴⁰ The following succinct statement has been proposed: “A 2,000 calorie diet is used as the basis for general nutrition advice; however, individual calorie needs may vary.”⁴¹

The menu labeling law also provides exemptions for certain food items.⁴² Specifically, items that are not listed on the menu board, such as condiments and items located on the table, do not require labeling.⁴³ Also, items that are temporary and do not appear on the menu for more than sixty days in a calendar year or items that are part of customary market testing and do not appear on the menu for more than ninety days are exempt from labeling.⁴⁴

At first glance, the menu labeling law may appear to be easy to implement. However, to date, the FDA has not issued final regulations due to the complexity of the labeling requirement.⁴⁵ FDA Commissioner Hamburg explained that “[t]here are very, very strong

³³ The law requires that for self-service food and display food, a sign must be placed “adjacent to each food offered . . . that lists calories per displayed food item or per serving.” 21 U.S.C. § 343(q)(5)(H)(iii).

³⁴ See Raven Clabough, *ObamaCare Food-Labeling Mandate to Increase Food Costs*, NEW AM. (Feb. 7, 2013), <http://www.thenewamerican.com/usnews/item/14460-obamacare-food-labeling-mandate-to-increase-food-costs>.

³⁵ 21 U.S.C. § 343 (q)(5)(H)(ii)(I) (2012).

³⁶ *Id.* § 343(q)(5)(H)(ii)(I)(aa).

³⁷ *Id.* § 343(q)(5)(H)(ii)(I)–(II); see also FDA Overview, *supra* note 28.

³⁸ 21 U.S.C. § 343(q)(5)(H)(v) (2012).

³⁹ *Id.*; see also FDA Overview, *supra* note 28.

⁴⁰ 21 U.S.C. § 343(q)(5)(H)(ii)(I)(bb)–(II)(bb) (2012).

⁴¹ FDA Overview, *supra* note 28.

⁴² 21 U.S.C. § 343(q)(5)(H)(vii).

⁴³ *Id.* § 343(q)(5)(H)(vii)(aa).

⁴⁴ *Id.* § 343(q)(5)(H)(vii)(bb)–(cc).

⁴⁵ See generally J. Patrick Doyle, *On Menu Regulations, Government Must Do Better*, THE HILL (AUG. 15, 2011), <http://thehill.com/blogs/congress-blog/politics/176887-on-menu-regulations-government-must-do-better> (discussing the complexity pizza restaurants face under the menu labeling law, where consumers have 34 million different ways to order a pizza, yet the restaurants must “label entire pizzas, and provide a calorie range that could be as wide as 2,000 calories”).

opinions and powerful voices both on the consumer and public health side and on the industry side, and we have worked very hard to sort of figure out what really makes sense and also what is implementable.”⁴⁶ Some restaurants currently have some form of menu labeling, while others are awaiting these final regulations before attempting to comply with the law. But, in the meantime, the larger question remains, will menu labeling meet its goal of assisting consumers in making better food choices, thereby leading to an eventual decrease in the nation’s obesity rate?

III. IS MENU LABELING EFFECTIVE?

Proponents of menu labeling opine that it provides consumers with the information to make better choices concerning the foods they consume, by allowing the opportunity to consider and weigh the healthiness of food options at a restaurant prior to consuming the food.⁴⁷ Yet for menu labeling to be effective, consumers must take the nutritional information provided and then decide to choose the healthier option over the less healthy option. For example, a consumer who decides to eat at McDonald’s may view the menu board and determine that a Big Mac contains 530 calories, and a Premium Southwest Salad with Grilled Chicken contains 290 calories.⁴⁸ Even armed with this information, the consumer may disregard it and choose the Big Mac over the Premium Southwest Salad with Grilled Chicken. However, the above scenario is a hypothetical—how likely is it that a consumer would make the unhealthy decision in the face of menu labeling?

Although the ACA’s menu labeling law has only recently been enacted, and thus its long-term effectiveness is unknown, other jurisdictions throughout the country enacted menu labeling several years ago, resulting in numerous studies analyzing their effectiveness. These studies serve as useful tools to foreshadow whether the menu labeling law is likely to be successful at motivating consumers to make healthier choices at restaurants, thereby abating the country’s obesity dilemma.

In 2009, one of the first studies to consider the effects of New York City’s menu labeling was published.⁴⁹ This study, conducted by New York University and Yale University, reviewed the receipts and survey responses for 1,156 adults at fast-food restaurants in low-income, minority New York neighborhoods, which were compared to a sample in Newark, New Jersey, that had not enacted menu labeling.⁵⁰ The study included four of the largest fast food chain restaurants in New York City and Newark:

⁴⁶ See Mary Clare Jalonick, *FDA Head Says Menu Labeling ‘Thorny Issue,’* ASSOCIATED PRESS (Mar. 12, 2013), <http://bigstory.ap.org/article/fda-head-says-menu-labeling-thorny-issue>.

⁴⁷ Banker, *supra* note 6, at 915–16.

⁴⁸ See *McDonald’s USA Nutrition Facts for Popular Menu Items*, MCDONALDS, <http://nutrition.mcdonalds.com/getnutrition/nutritionfacts.pdf> (last visited Oct. 14, 2014).

⁴⁹ See Brian Elbel *et al.*, *Calorie Labeling and Food Choices: A First Look at the Effects on Low-Income People in New York City*, 28 HEALTH AFF. w1110 (2009). From October 2005 to April 2006, a prior study was conducted in Minneapolis, Minnesota, where 605 participants ordered a fast food meal using different menus (with and without calorie information). See Lisa J. Harnack *et al.*, *Effects of Calorie Labeling and Value Size Pricing on Fast Food Meal Choices: Results from an Experimental Trial*, 5 INT’L J. OF BEHAV. NUTRITION & PHYSICAL ACTIVITY 63 (2008). This Minnesota study, which was the first study to “measure actual food choices within an experimental design” as compared to a study measuring behavioral intentions, found that menu labeling had “little effect on the food choices made by adolescents and adults who regularly eat at these establishments.” *Id.* at 11.

⁵⁰ See Elbel *et al.*, *supra* note 49, at w1110, w1112. New York City was chosen for the study because it was one of the first jurisdictions to enact menu labeling. *Id.* at w1112. Newark was chosen because it had not enacted menu labeling, its demographics are similar to New York City’s, and it is close enough to New York City to provide a consistent comparison, yet does not have a large number of commuters that travel to New York City. *Id.*

(1) McDonald's; (2) Burger King; (3) Wendy's; and (4) KFC.⁵¹ Study participants were asked a series of questions after they made their food purchases: (1) "whether they noticed any calorie information posted in the establishment; (2) if so, whether the information influenced their food choices; and (3) whether this calorie information caused them to purchase more or fewer calories."⁵² The researchers checked the participants' receipts to determine what they had ultimately ordered and compared to their responses.⁵³

The study revealed that menu labeling did not influence the total number of calories purchased.⁵⁴ In fact, the New York City participants "purchased a mean number of 825 calories before menu labeling was introduced and 846 calories after labeling was introduced."⁵⁵ Thus, they purchased more calories even when provided with menu labeling. Recognizing the limited effectiveness of menu labeling in the study, the authors attempted to assert some positive linkage between labeling and action, stating that "[i]n an ideal world, calorie labeling on menus and menu boards would have an immediate and direct impact on everyone's food choices."⁵⁶

This study revealed the complexity of using calorie information to influence a person's eating habits.⁵⁷ For example, approximately half of the consumers in the study reported that they noticed the calorie information posted on the menu boards.⁵⁸ For proponents of menu labeling, this percentage is relatively encouraging. Approximately 28% of study participants who reported noticing the calorie information stated that having this nutritional information influenced their ordering.⁵⁹ Of those, 88% reported making healthier food choices based upon the calorie information on the menu board.⁶⁰ Once again, such percentages are encouraging. However, when the researchers checked the participants' receipts, they determined that the participants had actually ordered more calories than the typical consumer did prior to the labeling law going into effect.⁶¹

In response to this study's findings that menu labeling did not affect consumer food choices at fast food restaurants, New York City's Department of Health and Mental Hygiene (the Department) released the results of its own study.⁶² The Department's study was comprised of a much larger sample than the independent study discussed above, studying more than 7,000 customers' behavior at 168 locations in 2007 before menu labeling, and more than 8,000 customers in 2009 after menu labeling had been

⁵¹ *See Id.*

⁵² *Id.* at w1113-14.

⁵³ *Id.* at w1113.

⁵⁴ *See Id.* at w1117.

⁵⁵ *Id.* at w1115.

⁵⁶ *See Id.* at w1117. The authors of the study recognized that "[e]ating behavior is notoriously resistant to change," and advocated using menu labeling as a supplement to other obesity-related policies. *Id.* at w1119.

⁵⁷ *See, e.g., Charles Babbage, New York's Calorie Counting*, *ECONOMIST* (JULY 28, 2011), <http://www.economist.com/blogs/babbage/2011/07/menu-labelling> (discussing the results of New York menu-labeling studies that illustrate how "food-related decision-making is highly complex and, like other aspects of human psychology, not changed simply by the provision of more information").

⁵⁸ Elbel et al., *supra note 49*, at w1114.

⁵⁹ *Id.* at w1114-15.

⁶⁰ *Id.* at w1115.

⁶¹ *Id.* at w1117. The study's author admitted that "[p]eople are eating these foods for a lot of reasons that trump health concerns. It's about convenience, it's about price, and fast foods tend to taste pretty good to most people." Melinda Wenner Moyer, *The Affordable Calorie Act*, *PAC. STANDARD* (OCT. 30, 2013), <http://www.psmag.com/navigation/health-and-behavior/affordable-calorie-act-obamacare-antiobesity-worse-67243/>.

⁶² Tamara Dumanovsky et al., *Changes in Energy Content of Lunchtime Purchases from Fast Food Restaurants after Introduction of Calorie Labeling: Cross Sectional Customer Surveys*, 343 *BRIT. MED. J.* (2011).

enacted.⁶³ The researchers determined that for three individual food chains out of the eleven studied there was a statistically significant decrease of calories purchased after menu labeling.⁶⁴ Overall, when analyzing the combined data from all eleven restaurants, the researchers found “no significant change in mean calories per purchase from before to after regulation.”⁶⁵ Those consumers who reportedly used the menu labeling purchased an average of 106 fewer calories than those who did not see or use the calorie information.⁶⁶ Yet, interestingly, consumers at the food chain Subway, popularly billed as a relatively healthier fast food restaurant, purchased more calories during the study period.⁶⁷ During that same period, Subway promoted its larger twelve-inch sandwich, which contained twice as many calories as the six-inch sandwich; thus, consumers were apparently swayed by price at Subway, not calories.⁶⁸

Both of the previous studies focused on the New York area, where menu labeling made its debut. Yet, studies have also been conducted for other areas of the country. For example, in King County in Washington (which includes Seattle), researchers from Duke-National University of Singapore Graduate Medical School and Seattle’s public health department studied menu labeling at the food chain Taco Time for the thirteen months after menu labeling had been enacted.⁶⁹ The researchers studied seven Taco Time restaurants in King County and compared them to seven restaurants outside the county, which were not required to provide menu labeling.⁷⁰ The results from the study found that menu labeling had no statistically significant effect on consumers’ food choices.⁷¹ The lead author of the study was surprised to find that menu labeling did not change consumer behavior and recommended additional research to determine “the circumstances under which mandatory menu labeling is likely to be most effective.”⁷²

Yet another study in Washington State’s King County, which surveyed more than 7,300 consumers at 10 restaurant chains both before and after the menu labeling law took effect, found a slight decrease of 38 calories in the average calories per purchase after menu labeling was introduced.⁷³ However, for those participants who reported seeing the nutritional information and using it to make their purchasing decision, there was an average decrease of 143 calories per purchase.⁷⁴ Acknowledging the limitations of menu labeling, the lead author of the study stated that “[menu labeling is] not the single

⁶³ *Id.* at 2–3.

⁶⁴ *Id.* at 3.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 4.

⁶⁸ *Id.*

⁶⁹ Eric A. Finkelstein et al., *Mandatory Menu Labeling in One Fast-Food Chain in King County, Washington*, AM. J. OF PREVENTATIVE MED. 122, 122 (2011).

⁷⁰ *Id.*

⁷¹ *Id.* at 125.

⁷² Katherine Hobson, *Study Finds Menu Labeling Didn’t Change Eating Habits*, WALL ST. J. HEALTH BLOG (JAN. 14, 2011, 11:26 AM), <http://blogs.wsj.com/health/2011/01/14/study-finds-menu-labeling-didnt-change-eating-habits/>; see also Pooja S. Tandon et al., *The Impact of Menu Labeling on Fast-Food Purchases for Children and Parents*, AM. J. OF PREVENTATIVE MED. 434, 434 (2011) (examining the purchasing behaviors of children ages 6–11 and their parents in King County both before and after menu labeling laws went into effect and concluding that “restaurant menu labeling regulation increased parents’ nutrition information awareness, but did not decrease calories purchased for either children or parents”).

⁷³ James W. Krieger et al., *Menu Labeling Regulations and Calories Purchased at Chain Restaurants*, AM. J. PREVENTATIVE MED. 595, 597 (2013).

⁷⁴ *Id.* at 597–98.

intervention, but one of several intersecting, overlapping strategies that encourage us to eat healthier foods and be physically active.”⁷⁵

As the previously mentioned studies indicate, the effectiveness of menu labeling is debatable, with some studies showing no significant consumer purchasing change due to menu labeling and some showing a small change.⁷⁶ In response to this ambiguity, some researchers have suggested that providing the caloric information alone on a menu may not be effective. Instead, additional information, such as the daily-recommended calorie intake, should also be provided, as is required under the ACA’s menu labeling provision. The reasoning behind this premise is that consumers may not realize the relative healthiness of a menu item based upon the calorie information alone without the correlating recommended daily calorie information. For example, a consumer may view an 800 calorie sandwich and 400 calorie large french fries as a typical lunch meal, without realizing that 1200 calories is 60% of the calories recommended for the entire day based upon a 2,000-calorie per day diet.⁷⁷

To test this premise, researchers have studied whether providing consumers with the recommendations for daily calorie intake, as well as the calorie information for the menu items, assists consumers in making healthier choices. A recent study, conducted by Carnegie Mellon University, involved 1,121 adult participants at two McDonald’s restaurants in New York City.⁷⁸ The participants were divided into three groups with each group receiving, in addition to the calorie menu labeling for each food item, one of following categories of information: 1) the recommended daily calorie intake; 2) the recommended per-meal calorie intake; and 3) no additional information.⁷⁹ The results of the study showed no significant difference between the purchasing behavior of those participants receiving the additional calorie recommendations per day or per meal.⁸⁰ According to the study’s lead author:

There have been high hopes that menu labeling could be a key tool to help combat high obesity levels in this country, and many people do appreciate having that information available. Unfortunately, this approach doesn’t appear to be helping reduce consumption very much, even when we give consumers what policymakers thought might help: some guidance for how many calories they should be eating.⁸¹

This study suggests that providing consumers with more information does not necessarily lead to healthier eating.

⁷⁵ Stephanie Stephens, *Calorie Counts on Menus Have Small but Promising Effects*, CENTER FOR ADVANCING HEALTH (May 9, 2013), <http://www.cfah.org/hbns/2013/calorie-counts-on-menus-have-small-but-promising-effects>.

⁷⁶ See *Elbel et al.*, *supra* note 49, at w1117; *Dumanovsky et al.*, *supra* note 62, at 3.

⁷⁷ U.S. DEP’T OF AGRIC. & U.S. DEP’T OF HEALTH & HUMAN SERVS., *DIETARY GUIDELINES FOR AMERICANS 2010*, 1, 13 (2010), *available at* http://www.cnpp.usda.gov/sites/default/files/dietary_guidelines_for_americans/PolicyDoc.pdf (stating that estimates on appropriate caloric intake “range from 1,600 to 2,400 calories per day for adult women and 2,000 to 3,000 calories per day for adult men, depending on age and physical activity level”).

⁷⁸ Julie S. Downs et al., *Supplementing Menu Labeling with Calorie Recommendations to Test for Facilitation Effects*, 103 AM. J. OF PUB. HEALTH 1604, 1605 (2013).

⁷⁹ *Id.*

⁸⁰ *Id.* at 1608.

⁸¹ Shia Rea, *Recommended Calorie Information on Menus Does Not Improve Consumer Choices, Carnegie Mellon Study Shows*, CARNEGIE MELLON NEWS (July 18, 2013), http://www.cmu.edu/news/stories/archives/2013/july/july18_menulabeling.html.

The amalgamation of these studies illustrates the controversy surrounding menu labeling. On one side, there are numerous studies showing a correlative benefit between menu labeling and consumer purchasing decisions, but for each of these studies there is a corresponding study showing that menu labeling has little to no effect on consumers.⁸² Some studies show that providing more nutritional information, such as the daily recommended calorie intake, in addition to menu labeling, does not assist consumers in making healthier purchasing choices. Against this backdrop, consumer purchasing decisions must be analyzed to explore whether menu labeling—in any form—can ultimately affect consumers' purchasing decisions.

IV. WHY CONSUMERS MAKE CERTAIN FOOD DECISIONS

Even proponents of menu labeling agree that menu labeling has not had the expected impact on consumers.⁸³ Shouldn't consumers, who are armed with nutritional information from menu labeling, typically make the healthier choice among the different food options? Yes, consumers should make the healthier choice, but, more often, they do not. The reasons behind this dichotomy are complex, requiring an examination of consumer behavior to analyze how consumers make decisions.

A. *Through the Behavioral Economics Lens—Bounded Willpower*

Traditional economic theory relies on the idea that consumers are rational beings who make decisions based upon maximizing utility.⁸⁴ Behavioral economics expands upon traditional economics by analyzing how humans actually behave under the law.⁸⁵ Thus, this theory seeks to determine whether and how economics affects human behavior, thereby allowing lawmakers to enact laws that will result in the desired human behavior. For example, in the area of menu labeling, using behavioral economics would analyze consumers' purchasing decisions to determine whether the labeling has the intended impact, i.e., changing consumer purchasing decisions in an effort to reduce obesity rates.

Although neoclassical economic theory focused on an individual making a decision based upon utility maximization, some economists questioned this theory.⁸⁶ These economists opined that individuals are vulnerable to irrational decision making.⁸⁷ Specifically, some economists concluded that consumer-purchasing decisions are not so simple and operate within certain behavioral bounds.⁸⁸ Pertinent to the area of consumer behavior in the context of menu labeling is bounded willpower.⁸⁹

⁸² See Elbel et al., *supra* note 49, at w1117; Dumanovsky et al., *supra* note 62, at 3.

⁸³ See Hobson, *supra* note 72.

⁸⁴ See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476 (1998) (citing Gary Becker's traditional economic principles: "[A]ll human behavior can be viewed as involving participants who [1] maximize their utility [2] from a stable set of preferences and [3] accumulate an optimal amount of information and other inputs in a variety of markets.").

⁸⁵ *Id.*

⁸⁶ See Daniel Kahneman, *A Psychological Perspective on Economics*, 93 AM. ECON. REV. 162, 163 (2003).

⁸⁷ *Id.*

⁸⁸ See Jolls et al., *supra* note 84, at 1476, 1480 (acknowledging that these bounds do not represent a complete explanation of human behavior, which is by its very nature, complex).

⁸⁹ See *Id.* (exploring the "three important 'bounds' on human behavior, bounds that draw into question the central ideas of utility maximization, stable preferences, rational expectations, and optimal process of information": bounded rationality, bounded willpower, and bounded self-interest).

Bounded willpower “refers to the fact that human beings often take actions that they know to be in conflict with their own long-term interests.”⁹⁰ According to traditional economic theory, an individual would make a purchasing decision based upon utility-maximizing, i.e., presumably using rational calculations to make whatever decision is best for that individual. Conversely, an individual with bounded willpower will likely not engage in the same deliberative decision-making process as the “rational” consumer. Instead, the bounded individual may decide to take an irrational course of action that he knows is not in his best self-interest without exercising self-control.

There are numerous examples of individuals recognizing their bounded willpower and taking actions to abate its effects. For example, individuals may realize that they need to lose weight, but lack the willpower to lose weight on their own. Thus, they join a diet plan or group to assist in achieving their weight loss goals. Another common example is the habit of smoking. Smoking is an action that is likely in conflict with an individual’s long-term interest of living a long, healthy life. A smoker may acknowledge that smoking is bad for him and may even have the strong desire to quit. To accomplish this goal, the smoker may join a group, take a drug to curb nicotine cravings, or reduce the amount of cigarettes purchased at one time, i.e., purchasing by the pack rather than by the carton.

In the realm of menu labeling, bounded willpower potentially provides one explanation for why consumers exhibit less healthy food choices. Traditional economic theory provides that consumers have unbounded rationality and will engage in a rational decision-making process when deciding what types of foods to consume. Thus, when faced with the choice of a healthy food choice versus a less healthy food choice, this consumer would consider what was best for that particular individual—what would maximize his utility. The consumer with bounded willpower, on the other hand, will likely choose the less healthy item, even though it is not in his long-term interests because he lacks the capacity and self-control to engage in rational decision-making to consider what is in his long-term best interests.

Although eating healthy has been overwhelmingly proven to be an essential element of a healthier lifestyle, prior menu labeling studies have shown consumers, even when provided with the nutritional content of their food options, routinely choose the less healthy option.⁹¹ Thus, consumers are not acting rationally and are exhibiting bounded willpower. They are making food choices that are against their long-term interests, i.e., living a longer, healthier life. Most consumers desire a longer, healthier life, but when faced with those tempting food options—a cheeseburger versus a grilled chicken sandwich—they lack the willpower to make the healthy choice. Bounded willpower presents a barrier to the future success of menu labeling at leading consumers to make better food choices.

B. *Hyperbolic Discounting*

Another theory used by behavioral economists to explicate human behavior is hyperbolic discounting. Hyperbolic discounting, essentially a subcategory of bounded willpower, more specifically describes how individuals focus on their short terms interests without considering the long-term impact. As described by one behavioral economist, “[h]yperbolic discount functions are characterized by a relatively high discount rate over short horizons and a relatively low discount rate over long horizons. This discount structure sets up a conflict between today’s preferences, and the

⁹⁰ See *Id.* at 1479.

⁹¹ See Elbel et al., *supra* note 49, at w1117.

preferences that will be held in the future."⁹² In other words, when given a choice, an individual will choose the option that provides the most immediate benefit rather than choosing an option that provides a benefit in the future.⁹³ This area of behavioral economics elucidates why individuals take certain actions that are clearly contrary to their best interests.⁹⁴

Several examples of the hyperbolic discounting theory are evident in human behavior. For example, if an individual wins the lottery, typically that individual will choose to have a smaller immediate sum of money, rather than waiting for a larger sum over a longer period of time.⁹⁵ Although the lottery winner would receive more money in the future, which presumably is the better financial choice, notwithstanding potential interest returns, the individual desires the money immediately and is not willing to sacrifice this immediacy for a superior long term benefit.⁹⁶ Another financial illustration of hyperbolic discounting is the typical personal savings habits of most individuals. Most individuals truly desire to save money for retirement, i.e., in the present, they want to improve their future financial state.⁹⁷ Yet, when they receive their monthly paycheck, they spend it immediately, deciding that they will save next month, and this cycle continues.⁹⁸ This hastiness and inability to recognize the importance of future saving is hyperbolic discounting.⁹⁹

Hyperbolic discounting may also explain consumer behavior within the menu labeling context.¹⁰⁰ Hypothetically, a health-conscious consumer enters a restaurant with the goal of eating healthy, but when presented with the various options from healthy to unhealthy, the consumer may decide to choose the less healthy option because next time—at some point in the future—the consumer reasons that he will make the healthy choice. Yet,

⁹² David Laibson, *Golden Eggs and Hyperbolic Discounting*, Q. J. OF ECON. 443, 445 (1997).

⁹³ See, e.g., Richard Thaler, *Some Empirical Evidence on Dynamic Inconsistency*, 8 ECON. LETTERS 201, 202 (1981) (discussing R. Strotz's example of how an individual will choose one apple today rather than two apples tomorrow).

⁹⁴ See Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*, 66 FLA. L. REV. 87, 104–06 (2014). Hyperbolic discounting seeks to explain how individuals discount costs and benefits differently based upon a present bias. For example:

If asked to choose between a slice of pizza at an earlier point in time and two slices just one hour later, a person feels differently about the hour-long waiting period (and the extra slice) if that period commences now or is slated to commence one week from now. Far-off tradeoffs are perceived differently from imminent ones. As a result, given the choice between a single slice of pizza at 5:00 PM next Thursday or two slices at 6:00 PM, a student may very happily agree today to wait just one additional hour for an extra slice of pizza. When "next Thursday" becomes today, however, and a single slice is a mere five minutes away, she is apt to change her mind.

Id. at 104.

⁹⁵ See Thaler, *supra* note 93, at 204 (studying how hyperbolic discounting may explain why a winner of a sum of money chooses immediacy over a larger sum).

⁹⁶ *Id.*

⁹⁷ Laibson, *supra* note 92, at 446.

⁹⁸ See Jesse M. Shapiro, *Is There a Daily Discount Rate? Evidence from the Food Stamp Nutrition Cycle*, 89 J. PUB. ECON. 303 (2005) (using hyperbolic discounting to explain why food stamp recipients consume ten to fifteen percent more calories at the beginning of the month than at the end of the month).

⁹⁹ Laibson, *supra* note 92, at 446 ("For example, this year I may desire to start an aggressive savings plan next year, but when next year actually rolls around, my taste at that time will be to postpone any sacrifices another year.").

¹⁰⁰ See, e.g., Timothy J. Richards & Stephen F. Hamilton, *Obesity and Hyperbolic Discounting: An Experimental Analysis*, 37 J. OF AGRIC. & RESOURCE ECON. 181, 193 (2012) (studying the correlation between obesity and hyperbolic discounting and concluding that "[c]onsumers who discount heavily, or even in a manner consistent with quasi-hyperbolic discounting, will be less likely to change their consumption because the future costs mean less to them than to other, exponentially-discounting addicts").

when this same consumer enters the restaurant to make the same decision, i.e., healthy versus unhealthy food option, the consumer once again chooses the less healthy option. After all, next time the consumer will make the healthy choice.

Hyperbolic discounting illuminates how the effectiveness of menu labeling may not be as straightforward as proponents of the labeling initiative anticipated. These proponents envisaged consumers using menu labeling to actually change their behavior by encouraging them to choose a healthier option. Yet, the results of many of the previously mentioned studies found that consumers did not actually change their behavior; indeed, in some studies, the consumers consumed more calories in response to menu labeling.¹⁰¹ These consumers desire the immediate gratification of the less healthy option and genuinely anticipate making a healthier choice in the future. Menu labeling faces an arduous undertaking in the face of hyperbolic discounting.

C. Vicarious Goal Fulfillment

The area of consumer psychology—a not-so-distant cousin of behavioral economics—also explains why consumers make particular food choices. Specifically, a study by Dr. Gavan Fitzsimons, a professor at Duke University’s Fuqua School of Business, analyzed the behavior of consumers when confronted with the choice of healthy food options, in addition to unhealthy food options.¹⁰² Recognizing that fast food restaurants were offering healthier alternatives in response to consumer desire for these healthier options, this study sought to determine whether the presence and choice of these healthier items influenced consumers to make better choices.¹⁰³ The study cited an encouraging statistic that 72% of Americans plan to make healthy choices when eating at restaurants.¹⁰⁴ Yet the study’s results revealed that 33% of consumers chose to indulge in an unhealthy item when healthy items were also offered, compared to just 10% of consumers who chose to indulge in an unhealthy item when no healthy items were presented.¹⁰⁵ Three follow-up studies were conducted, and all confirmed the results of the initial study—when healthy options are added to a menu, individuals may identify the presence of the healthy option as in line with their desire to make healthy choices and then may feel justified in choosing a more indulgent option.¹⁰⁶ This study confirmed the counterintuitive notion of “vicarious goal fulfillment,” where an individual who eats at a restaurant that offers healthier food options deems he has fulfilled his goal of eating healthy even though he chooses the least healthy food options.¹⁰⁷ In summary, the act of being in a place that

¹⁰¹ See Elbel et al., *supra* note 49, at w1117.

¹⁰² Keith Wilcox et al., *Vicarious Goal Fulfillment: When the Mere Presence of a Healthy Option Leads to an Ironically Indulgent Decision*, 36 J. OF CONSUMER RES. 380 (2009), available at <https://zicklin.baruch.cuny.edu/faculty/profiles/block.html/papers/lauren/vicarious-goal-fulfillment.pdf>.

¹⁰³ *Id.* at 381.

¹⁰⁴ *Id.* at 380.

¹⁰⁵ *Id.* at 382. In the study, participants were asked to choose between three relatively unhealthy options and then a choice set of those three relatively unhealthy options with the addition of one healthy option—a side salad. *Id.* When the side salad was part of the choice set, 33% of the participants chose the least healthy option—the french fries, versus 10% who chose the least healthy option when the side salad was not part of the choice set. *Id.*

¹⁰⁶ *Id.* at 390. The study also specifically focused on those individuals who have high self-control when making food choices. *Id.* Ironically, the study found that these individuals were even more likely to choose the least healthy item when a healthy item was also offered. *Id.* The study concluded that for these particular individuals, they are vicariously fulfilling their goal of eating healthy when a healthy option is included on the menu, even though they do not partake of this healthy choice. *Id.*

¹⁰⁷ *Id.*

serves healthy options, like salads or whole fruit, fulfills the desire to be healthy and provides the consumer with an excuse to select less healthy options like french fries.¹⁰⁸

Vicarious goal fulfillment presents another hurdle for the success of menu labeling. One theory behind menu labeling is that restaurants, once they are forced to disclose the nutritional content of their food offerings, will develop and present healthier food options for consumers.¹⁰⁹ Yet, as the Duke study indicates, even those individuals who consciously desire to eat healthy, choose the least healthy food options when healthier food options are presented.¹¹⁰ The authors of the study lamented that “[t]he most obvious implication of these findings is that, despite the rush to offer healthier food alternatives, this trend may be doing little to alleviate the deeper societal issue of rising waistlines.”¹¹¹ As further evidence, the study cites the executive vice president of a food industry consulting firm who notes that “[w]hat people say they want and what they do don’t match up. If they say, ‘I’m gonna order more salads,’ they’re going to order more french fries.”¹¹² Thus, similar to hyperbolic discounting and bounded willpower, a consumer’s long-term goal of eating healthy presents a direct conflict with his immediate desire to eat unhealthily.¹¹³

V. CONSEQUENCES OF MENU LABELING

Menu labeling proponents point out many potential positive impacts from menu labeling. Primarily, these proponents advocate that menu labeling will help to solve our nation’s obesity crisis because consumers will use this additional information to make healthier choices.¹¹⁴ Yet as previously discussed, whether consumers will actually act on this information is not clear.¹¹⁵ Even if consumers do not use the labeling, proponents also argue that restaurants will feel pressure to include healthier food choices on the menu because they will be forced to be more transparent about the healthiness of the food items.¹¹⁶ Thus, even if consumers do not use the menu labeling, it will cause the restaurant to reconsider creating and selling a high-calorie item. With the potential impact of a healthier population with healthier food options at restaurants, proponents question opposition to menu labeling.¹¹⁷ Because at first glance, menu labeling appears to be a viable option to fight obesity at relatively low cost. Yet, are there costs that these proponents have failed to consider?

¹⁰⁸ *Id.*

¹⁰⁹ Banker, *supra* note 6, at 917.

¹¹⁰ Wilcox et al., *supra* note 102, at 390.

¹¹¹ *Id.*

¹¹² *Id.* (citations omitted). As world renowned economist Thomas Schelling explains this dichotomy, “[p]eople behave sometimes as if they had two selves, one who wants clean lungs and long life and another who adores tobacco, or one who wants a lean body and another who wants dessert.” THOMAS C. SCHELLING, CHOICE AND CONSEQUENCE 58 (1984).

¹¹³ See, e.g., Stephanie Clifford, *Why Healthy Eaters Fall For Fries*, N.Y. TIMES (JUNE 29, 2013), <http://www.nytimes.com/2013/06/30/sunday-review/why-healthy-eaters-fall-for-fries.html> (discussing how the Duke study explains why healthy items comprise limited sales at fast food restaurants and that menu labeling is unlikely to change this consumer behavior).

¹¹⁴ Banker, *supra* note 6, at 917.

¹¹⁵ See *supra* Part III.

¹¹⁶ Banker, *supra* note 6, at 917.

¹¹⁷ RUDD CTR., *supra* note 3, at 3.

A. *Is Regulation the Answer?*

The ACA's menu labeling requirement is just one of many laws passed by Congress. In fact, a recent study from the free-market Competitive Enterprise Institute (CEI) determined that last year, regulators issued 3,659 rules, which equates to a new rule every two and half hours.¹¹⁸ The costs associated with these regulations are rarely discussed in policy debates and are difficult to calculate because they are unbudgeted and often indirect.¹¹⁹ However, the CEI annually reviews these costs and publishes its report entitled "The Ten Thousand Commandments" in an effort to make these costs more transparent.¹²⁰ For 2013, the cost for Americans to comply with federal regulations was \$1.863 trillion, which is more than the entire economies of all but nine countries in the world.¹²¹

To give more perspective, the 2013 Federal Register, which published the proposed and final federal regulations, was 79,311 pages.¹²² The Federal Register is one of the most common methods of measuring the scope of federal regulations.¹²³ However, caution must be exercised in using this source as a regulatory cost measure based on a number of factors. First, the Federal Register contains proposed regulations in addition to final ones; thus, some of these proposed regulations never become law.¹²⁴ Also, counting pages may not fully elucidate how expensive the various regulations are. For example, an extremely costly regulation may only encompass a couple of pages or even paragraphs and vice-versa.¹²⁵ Yet against this cautionary backdrop, the Federal Register illustrates how the number of regulations is increasing, particularly when analyzing the final regulations, rather than proposed regulations.¹²⁶ The final regulations from 2012 to 2013 increased 7%, from 24,690 pages to 26,417 pages, respectively.¹²⁷

Clearly, the federal government is increasingly imposing additional financial burdens on the private sector and state and local governments through regulations.¹²⁸ To the average consumer, these costs may not seem evident or overwhelming. Yet, businesses

¹¹⁸ Clyde Wayne Crews, Jr., *Ten Thousand Commandments, An Annual Snapshot of the Federal Regulatory State*, 58 COMPETITIVE ENTERPRISE INST. 1 (2014).

¹¹⁹ *Id.* at 5.

¹²⁰ *Id.* at 2 (describing one purpose of the compilation is to "make the regulatory state somewhat more comprehensible").

¹²¹ *Id.* at 11 (surpassing the 2012 GDPs of both Canada, which was \$1.821 trillion and Mexico, which was \$1.178 trillion).

¹²² *Id.* at 16. This page number is the fourth highest page number count in *Federal Register* history. *Id.* The highest page number counts were in 2010 and 2011, respectively, and 2008 was the third highest. *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 17.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ This increase in regulations may explain why some individuals and small business are not willing to create new businesses, due to the high costs and the high failure rate. *See, e.g.*, Ian Hathaway & Robert E. Litan, *Declining Business Dynamism in the United States: A Look at States and Metros*, THE BROOKINGS INSTITUTION (MAY 2014), available at http://www.brookings.edu/~media/research/files/papers/2014/05/declining%20business%20dynamism%20litan/declining_business_dynamism_hathaway_litan.pdf (discussing how business creation has been declining for the last few decades); *see also* Christopher Ingraham, *U.S. Businesses Are Being Destroyed Faster than They're Being Created*, WASH. POST (May 5, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/05/05/u-s-businesses-are-being-destroyed-faster-than-theyre-being-created> (reviewing the findings from the Brookings Institution Study which found for the years 2009–2011 businesses were collapsing quicker than they were being created).

faced with these high regulatory costs typically pass these costs onto the consumer.¹²⁹ If the annual regulatory costs are passed directly onto consumers, this burden amounts to \$14,974 per household, more than the average household spends on any other item in their budget except housing.¹³⁰ Consumers may not immediately notice these costs when shopping or eating at restaurants, but these regulatory costs are hidden in the form of higher prices that likely disproportionately affect lower-income households.¹³¹

The most obvious regulatory cost of menu labeling is the cost to restaurants to implement the labeling requirement. There are two components of cost to restaurants to meet the labeling requirements. First, restaurants must test the food items to be listed on the menu to determine the nutritional content.¹³² Next, the restaurants must include this nutritional information on menus and menu boards.¹³³ Although some restaurants already include this information on their menus and menu boards, for many restaurants this will be a new cost.¹³⁴ The FDA estimates complying with the ACA may cost restaurants up to \$457 million during the first year of implementation.¹³⁵ Annual recurring costs for menu labeling and menu board updates will be approximately \$26.8 million dollars.¹³⁶ These are FDA estimates, while other agencies estimate the implementation costs to be closer to \$757 million.¹³⁷ The Office of Management and Budget, a part of the Executive Office of the President, ranked the ACA's menu labeling law as the third most burdensome regulation enacted in 2010, resulting in 14,536,183 work hours each year.¹³⁸

Proponents of menu labeling claim that most restaurants already voluntarily conduct the laboratory testing for nutritional content.¹³⁹ This implies that the requirement does not truly impose an additional cost, and for those restaurants that do not currently conduct such testing, the costs incurred are minor.¹⁴⁰ Yet, even assuming this argument has validity, restaurants will be required to reprint their menus and menu boards to comply with the law, which will be an annual regulatory cost of approximately \$1,400 to upwards of \$5,000.¹⁴¹ These costs are not insignificant to many business owners,

¹²⁹ Crews, *supra* note 118, at 12.

¹³⁰ *Id.*

¹³¹ See, e.g., Diana Thomas, *Regressive Effects of Regulation*, MERCATUS CENTER GEORGE MASON U., 20–22 (Nov. 2012), http://mercatus.org/sites/default/files/RegressiveEffects_Thomas_v1-0.pdf (finding regulatory costs may be as much as six to eight times more for low-income households compared to higher-income households).

¹³² See 21 U.S.C. § 343(q)(5)(H)(iv) (2012) (requiring “reasonable basis” for the nutritional information provided, which includes “laboratory analyses”).

¹³³ See *Id.* § 343(q)(5)(H)(ii).

¹³⁴ See Doyle, *supra* note 45 (complaining about the new, increased costs pizza restaurants will face from the menu-labeling law).

¹³⁵ FOOD & DRUG ADMIN., FOOD LABELING: NUTRITION LABELING OF STANDARD MENU ITEMS IN RESTAURANTS AND SIMILAR RETAIL FOOD ESTABLISHMENTS NOTICE OF PROPOSED RULEMAKING, PRELIMINARY REGULATORY IMPACT ANALYSIS 1, 44 (2011), available at <http://www.fda.gov/downloads/Food/IngredientsPackagingLabeling/UCM249276.pdf>.

¹³⁶ *Id.* at 42.

¹³⁷ See AMERICAN ACTION FORUM, NEW ACA RESTAURANT MENU REGULATION (Aug. 28, 2013), available at <http://americanactionforum.org/infographics/new-aca-restaurant-menu-regulation>.

¹³⁸ *Information Collection Budget for FY 2010*, OFF. OF MGMT. & BUDGET 1, 6 (Mar. 2011), http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/2011_icb.pdf.

¹³⁹ RUDD CTR., *supra* note 3, at 7.

¹⁴⁰ *Id.*

¹⁴¹ See Doyle, *supra* note 45 (stating that independent Domino's franchisee owners will be responsible for costs incurred for new menu boards, which could cost from \$1,600 to \$4,700); Dina ElBoghdady, *Pizza Chains Band Together Over Proposed Menu-labeling Plan*, WASH. POST (June 19, 2012), <http://www.washingtonpost.com/business/economy/pizza-chains-band-together-over-proposed-menu-labeling->

resulting in not only increased costs to consumers but also reduced funds for hiring employees or providing raises for current employees.

At initial glance, it appears the focus of the menu labeling law was to impact large fast food chains, such as McDonald's and Wendy's. Although the law will impact these food chains, the true financial impact of the law may also fall on the individual franchises that are considered small independent businesses.¹⁴² More than eighty percent of McDonald's are owned and operated by individual franchisees.¹⁴³ These franchisees, as owners of a restaurant with twenty or more locations, are required to comply with the menu labeling law; thus, they will be required to update their menus and menu boards and incur additional financial burdens.¹⁴⁴ Although the FDA claims that the costs to businesses will be minimal, for these small independent businesses, any additional regulatory costs may have serious repercussions.

Regulatory costs are not fictional costs. Even though they may not be the focus of policy debates, these costs are real to business owners and local and state governments. However, the ultimate payer of these costs is the consumer, in the form of higher prices. Based upon the menu labeling research conducted to date, the impact of menu labeling seems questionable.¹⁴⁵ Thus, a cost-benefit analysis should be conducted to determine whether menu labeling provides a true benefit to consumers or is an additional regulatory cost with no correlative benefit to consumers.¹⁴⁶

B. *Will Not Benefit Certain Consumers*

The premise behind menu labeling, as previously discussed, is that disclosing the nutritional content of the foods consumers are contemplating eating will help them make healthier dietary choices.¹⁴⁷ However, one unintended consequence that lawmakers likely did not consider is the effect of the menu labeling law on those consumers suffering from eating disorders.¹⁴⁸ Eating disorders affect approximately 20 million women and 10 million men at some point during their life, which equates to almost 10% of the U.S.

plan/2012/06/19/gJQXcf3oV_story.html (complaining that small, individual business owners will be responsible for replacing menu boards, resulting in costs of \$3,000 to \$5,000 per year).

¹⁴² Jason Stverak, *Obamacare's Restaurant Calorie-Label Mandate Is a Complete Mess*, FORBES (Feb. 7, 2014, 2:46 PM), <http://www.forbes.com/sites/theapothecary/2014/02/07/obamacares-restaurant-calorie-label-mandate-is-impossible-to-implement/>.

¹⁴³ *About McDonald's*, MCDONALDS, <http://www.aboutmcdonalds.com/mcd/franchising.html> (last visited Oct. 14, 2014); see also Stverak, *supra* note 142.

¹⁴⁴ In an op-ed article, the president and CEO of Domino's Pizza, Inc., expressed his dismay at the menu labeling law, which he claims will disproportionately affect small business owners, such as Domino's franchisees. The average franchisee owns four stores, and half of U.S. store operators own only one store. See Doyle, *supra* note 45. Doyle estimates that providing consumers with the required nutritional information on menu boards will "cost each store thousands of dollars every year (starting at \$1,600 and going up to \$4,700 per year)." *Id.*

¹⁴⁵ See *supra* Part III.

¹⁴⁶ See, e.g., Stverak, *supra* note 142 ("Had the architects of the ACA done their homework, they would have realized that mandated calorie labeling is an ineffective method of fighting obesity. Instead, the FDA will create an estimated \$537 million in costs for a regulation that is doomed to fail from the outset. When these businesses pass compliance costs on to consumers, we'll all pay the price for Washington's inability to keep its hands off our lunches.").

¹⁴⁷ See Banker, *supra* note 6, at 915–17.

¹⁴⁸ See Christina A. Roberto et al., *Calorie Estimation Accuracy and Menu Labeling Perceptions Among Individuals With and Without Binge Eating and/or Purging Disorders*, EATING AND WEIGHT DISORDERS—STUDIES ON ANOREXIA, BULIMIA AND OBESITY 1, 4 (2013) (discussing the likelihood that menu labeling could assist eating disorder sufferers to properly assess the caloric content of foods, but recognizing the actual possibility that menu labeling will contribute to their disorder by encouraging them to eat in a pathological manner or avoid particular restaurants).

population.¹⁴⁹ Pertinent to menu labeling where restaurants must list the caloric content of foods, “[c]alorie counting is a characteristic of eating disorders and dieting,” where individuals may become obsessed with the amount of calories they consume.¹⁵⁰ For those individuals with eating disorders, calories on a menu can perpetuate and contribute to the disorders.¹⁵¹ As described by someone recovering from anorexia who visited a Thai restaurant with menu labeling, she felt constrained “to pick the thing on the menu with the lowest number of calories.”¹⁵² Menu labeling may actually be harmful for a certain percentage of the country.

For example, Harvard University was one of the first organizations in the country to implement menu labeling in the school’s cafeteria in the form of “calorie cards” that were placed alongside the food with the goal of educating students about the nutritional content of their food.¹⁵³ When parents and students raised concerns about the cards contributing to eating disorders, the university made the decision to remove the cards from the food lines and instead provide the information at kiosks and on their website.¹⁵⁴ In explaining its decision, Harvard University Dining Services explained:

Specifically, we needed to address the challenge a quiet and surprisingly large contingent of our community faces with eating disorders. Those individuals can place an undue emphasis on calories and other literal food values, making their placement over every food item a real challenge. Thus, we did what we felt best addressed the special needs of those individuals
...¹⁵⁵

Harvard University Dining Services weighed the benefits of the calorie cards against the risk of exacerbating students’ eating disorders and decided that these risks outweighed the benefits, opting instead to make the information accessible, but in a less prominent location.

Menu labeling is likely to exacerbate the difficulties of those individuals suffering from eating disorders due to the emphasis these individuals place on each and every eating decision made. With calories blatantly stated on each menu and menu board at those restaurants subject to the menu labeling law, these sufferers will be frequently reminded of the supposed importance of calories, thereby resulting in eating decisions furthering their disorder.¹⁵⁶ Those proponents of menu labeling who claim the requirement incites no harm and merely provides consumers with additional information to make better decisions, should consider the population experiencing eating disorders.

¹⁴⁹ *Get the Facts on Eating Disorders*, NAT’L EATING DISORDERS ASS’N, <https://www.nationaleatingdisorders.org/get-facts-eating-disorders> (last visited Oct. 14, 2014).

¹⁵⁰ Glenn Waller et al., *COGNITIVE BEHAVIORAL THERAPY FOR EATING DISORDERS: A COMPREHENSIVE TREATMENT GUIDE* 81 (2007).

¹⁵¹ Nina Puro, *How Calorie Displays Trigger Eating Disorders*, THE FIX (Dec. 10, 2012), <http://www.thefix.com/content/calories-displays-trigger-eating-disorders91015>.

¹⁵² *Id.*

¹⁵³ Melody Y. Hu, *Calorie Cards Removed From Dining Halls*, HARVARD CRIMSON (Sept. 24, 2008), <http://www.thecrimson.com/article/2008/9/24/calorie-cards-removed-from-dining-halls/>.

¹⁵⁴ *Id.*

¹⁵⁵ *Healthy Eating at Harvard*, HARVARD U. DINING SERVICES BLOG (Sept. 22, 2008), http://harvarddining.blogspot.com/2008_09_01_archive.html.

¹⁵⁶ See Roberto et al., *supra* note 148, at 4.

C. *Calories Not Created Equally*

The menu labeling law focuses on providing one aspect of the nutritional content of food to consumers on menus and menu boards—calories and only calories.¹⁵⁷ The caloric information for each food item offered on the menu and menu boards, with particular exceptions, must be provided to consumers, along with a generic statement concerning the recommended daily amount of calories that should not be exceeded.¹⁵⁸ Based upon this emphasis on calories, policymakers behind the menu labeling law clearly felt that caloric content was extremely important to encouraging better eating habits for consumers. Yet calories are merely one component of the nutritional make-up of foods and isolating this one component as a gauge of healthiness provides an incomplete picture to consumers.

For example, studies have shown that not all calories are created equal.¹⁵⁹ According to Dr. David Ludwig, Professor of Nutrition at Harvard School of Public Health, “the accounting approach” of counting calories to lose weight that most Americans have historically been using is not effective because the human body does not process all calories the same.¹⁶⁰ Instead, the source of the calorie impacts how it is processed, with those calories coming from naturally high-fat foods (such as nuts and avocados) leading to greater weight loss than those coming from lower calorie high-glycemic foods (such as cereals and crackers), which are not as filling.¹⁶¹ “A calorie is not a calorie” because the body processes the macronutrients in foods differently.¹⁶²

In the context of menu labeling, a consumer who visits a restaurant subject to the law will be provided with the caloric information for the available food options, and for those consumers who pay attention to this information and use it to inform their food choices, they are led to believe that choosing a lower calorie option is the healthier option. Thus, this consumer, when given the beverage choice of milk or diet soda, would likely choose the diet soda if strictly focused on calorie counting, and although the healthiness of milk over diet soda is obvious, not all such quality calorie choices will be as evident, leading consumers to make less healthy food choices based upon the false accuracy of sole calorie counting. As nutritionists and experts having been claiming for years, the focus on calories is outdated and not an accurate portrayal of a healthy diet.¹⁶³ The quality of the calories matters much more the quantity of the calories.¹⁶⁴ The current menu labeling law furthers the obsolete and erroneous notion that calorie counting equates to healthier eating.

¹⁵⁷ See 21 U.S.C. § 343(q)(5)(H)(ii) (2012).

¹⁵⁸ *Id.*

¹⁵⁹ See Cara B. Ebbeling et al., *Effects of Dietary Composition During Weight Loss Maintenance: A Controlled Study*, 307 *JAMA* 2627, 2631–32 (2012) (discussing controlled feeding study that analyzed the biological effects of different diets in view of the theory that “a calorie is a calorie” with results rejecting the theory).

¹⁶⁰ Markham Heid, *You Asked: Are All Calories Created Equal?*, TIME (July 16, 2014), <http://time.com/2988142/you-asked-are-all-calories-created-equal/>.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Anahad O’Connor, *‘Fed Up’ Asks, Are All Calories Created Equal?*, N.Y. TIMES (May 9, 2014), http://well.blogs.nytimes.com/2014/05/09/fed-up-asks-are-all-calories-equal/?_php=true&_type=blogs&_r=0 (discussing how Dr. Dariush Mozaffarian, an associate professor of medicine and epidemiology at Harvard Medical School, described “the long-held idea that we get fat solely because we consume more calories than we expend is based on outdated science”).

¹⁶⁴ See Dariush Mozaffarian et al., *Changes in Diet and Lifestyle and Long Term Weight Gain in Women and Men*, 364 *NEW ENG. J. MED.* 2392, 2398–401 (2011).

D. *Who Will Be Impacted by Menu Labeling*

The motivation behind the menu labeling law is that providing consumers with nutritional information will cause them to order healthier food and, over time, healthier food will ultimately lead to weight loss.¹⁶⁵ The law presumes that as consumers continue to eat healthier food and lose weight, the country's obesity numbers will begin to fall.¹⁶⁶ To determine whether the law will have its intended impact, it is important to determine who comprises the obese population and whether the menu labeling law will have its intended impact on this population.

Approximately one-third of all adult Americans are obese, and 17% of children are considered obese.¹⁶⁷ These statistics are alarmingly high, yet at the same time encouraging because the numbers appear to have stabilized between 2003–2004 and 2011–2012.¹⁶⁸ Within the obese population, statistics vary among the different socioeconomic classes as defined by educational level, with both men and women with college degrees having a significantly lower rate of obesity than those with some college education or less.¹⁶⁹ When looking at income levels, overall obesity rates are similar for men at all income levels, but, for women, obesity rates increase as the income level declines.¹⁷⁰ These statistics illuminate the reality that obesity affects a considerable group of people across all income and educational levels with no group escaping its reach.

Recognizing the prevalence of obesity and how the menu labeling law could abate its effects, the United States Department of Agriculture recently conducted a study to determine the baseline and demographics of consumers either currently using or planning to use menu labeling when eating at restaurants.¹⁷¹ According to the Department, this baseline would be helpful to analyze the true impact of the menu labeling law once it was fully implemented.¹⁷² The baseline study revealed that men and women tend to eat at restaurants with the same frequency, but men are less likely to pay attention to menu labeling than women.¹⁷³ In addition, the study found that those participants who eat more frequently at restaurants were less likely to use the menu labeling than those who dined out less frequently.¹⁷⁴ The most significant, but perhaps unsurprising, finding of the study was that participants who have a healthier diet were more likely to use menu labeling than those participants with a less healthy diet.¹⁷⁵ In fact, the authors of the study concluded:

¹⁶⁵ Banker, *supra* note 6, at 915–16.

¹⁶⁶ *Id.* at 917.

¹⁶⁷ Cynthia L. Ogden et al., *Prevalence of Childhood and Adult Obesity in the United States, 2011–2012*, 311 JAMA 806 (2014).

¹⁶⁸ *Id.* at 813.

¹⁶⁹ Cynthia L. Ogden et al., *Obesity and Socioeconomic Status in Adults: United States, 2005–2008*, NAT'L CENTER FOR HEALTH STAT. 1, 3 (Dec. 2010), <http://www.cdc.gov/nchs/data/databriefs/db50.pdf>.

¹⁷⁰ *Id.* at 1–2.

¹⁷¹ Christian A. Gregory et al., *Consumers' Use of Nutrition Information When Eating Out*, U.S. DEP'T OF AGRIC. (June 2014), <http://www.ers.usda.gov/media/1498320/eib127.pdf>.

¹⁷² *Id.* at 3.

¹⁷³ *Id.* at 7.

¹⁷⁴ *Id.* at 19, 23.

¹⁷⁵ *Id.* at 23, 27 (finding that for those patrons who ate at full-service restaurants who reported the frequency with which they had healthier foods at home, the “rarely or never” group was also less likely than all other groups to use nutrition information on [the] menus (i.e., 35 percentage points less likely than the ‘always or most of the time’ group”).

Thus, it appears that consumers who already have healthful diets may be more likely to benefit from the mandatory disclosure of nutrition information and that mere exposure to the nutritional labels may not be enough to motivate those who do not benefit from mandatory disclosure of nutrition information.¹⁷⁶

The authors acknowledged that if consumers did not use the menu labeling, then it would not be useful.¹⁷⁷

The menu labeling law was implemented to lower the country's obesity rate, yet this study confirms what the authors predicted—that those who most need menu labeling, i.e., those with unhealthy diets who are overweight or obese, are the least likely to use it. Indeed, restaurants have been partially blamed for our nation's obesity, yet the above study found that those consumers who eat at restaurants more frequently are even less likely to take advantage of menu labeling. This study was merely a baseline to compare menu labeling before the law takes effect under the ACA and after the labeling has been implemented. Yet, the study foreshadows a troubling reality to the menu labeling law—encouraging consumers to eat healthier will likely not be accomplished by the menu labeling law.

VI. CONCLUSION

Obesity does not discriminate and affects numerous people in all races and socioeconomic classes. The ACA included a menu labeling requirement as one method to lower the obesity rate, and although the final regulations under the ACA have not been implemented, reviewing the results of those municipalities that previously enacted menu labeling provides a glimpse of the likelihood that the ACA's menu labeling requirement will be successful in lowering the obesity rate. Unfortunately, this preview paints a dubious picture of the success of menu labeling. Menu labeling studies conducted to date have shown that menu labeling has little to no effect on consumer eating habits, with those consumers using menu labeling being the ones who least need it.

Menu labeling studies have exposed that changing consumer behavior is more difficult than just providing information. Behavioral economics explicates the difficulty in altering the eating habits of consumers by illustrating that consumers, even when provided with helpful information to help them make better choices, will not make healthier selections. Instead, consumers focus on their short-term interests of satisfying their appetites and undervalue long-term benefits of eating healthy. Menu labeling is unlikely to impact this longstanding consumer behavior.

Proponents of menu labeling rely on the claim that even if the law does not have a significant impact, it may assist some consumers in making healthier choices. Yet, this narrow view does not consider the unintended consequences of menu labeling that may ultimately harm all consumers in the form of higher food prices, due to the extraordinary regulatory costs of menu labeling. Restaurants forced to provide menu labeling will pass these regulatory costs on to consumers, and if consumers do not use menu labeling, they will be paying these regulatory costs with no correlative benefit. In addition, there are certain groups of consumers, such as those suffering from eating disorders, who will actually be harmed by menu labeling. Lastly, the primary focus of menu labeling is to provide the caloric content of the food, but not all calories are

¹⁷⁶ *Id.* at 35.

¹⁷⁷ Gregory et al., *supra* note 171, at 35.

created equal, which may lead some consumers to make unwise decisions based upon this limited data set.

Unfortunately, policymakers do not appear to have analyzed the unlikelihood that menu labeling could successfully lower the nation's obesity rate, nor did they consider all the unintended consequences of menu labeling. If a proper analysis of the experiences of other municipalities with menu labeling had been done, it is unlikely that the menu labeling law would ever have been passed. Thus, lawmakers should strongly contemplate the implausibility of menu labeling affecting the nation's obesity rate, coupled with the certainty that the law will harm some, if not all, consumers, and the law should be repealed. Instead, menu labeling for restaurants should be voluntary, and those consumers who desire labeling would have the freedom to frequent restaurants that provide the information voluntarily. With voluntary menu labeling, the majority of consumers, who would have paid no attention to the labeling anyway, will be allowed to eat at restaurants without the increased regulatory costs and will continue to ignore those calorie numbers on the menu, ordering what they want, when and where they want it.

ADDENDUM

On December 1, 2014, the FDA issued its long-awaited final rule pertaining to menu nutrition labeling.¹⁷⁸ Those restaurants that fall within the scope of the rule have until December 1, 2015, to comply.¹⁷⁹ For the most part, the final rule basically expands upon the proposed rules and contains few unanticipated requirements, except for the rather broad category of restaurant-type establishments that are now included within the ambit of the law and must comply. The most significant provisions of the rule are discussed below to provide an accurate context for this article.

The final rule applies to any "covered establishment," which is defined as "a restaurant or similar retail food establishment that is a part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership, e.g., individual franchises) and offering for sale substantially the same menu items."¹⁸⁰ To fully understand which entities are covered, other terms within this definition are also defined by the rule. First, "restaurant or similar retail food establishment" is defined as "a retail establishment that offers for sale restaurant-type food . . ."¹⁸¹ This broad definition encompasses more than the conventional restaurant; rather, the rule includes the following:

bakeries, cafeterias, coffee shops, convenience stores, delicatessens, food service facilities located within entertainment venues (such as amusement parks, bowling alleys, and movie theatres), food service vendors (e.g., ice cream shops and mall cookie counters), food take-out and/or delivery establishments (such as pizza take-out and delivery establishments), grocery

¹⁷⁸ Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Food Establishments, Final Rule, 79 Fed. Reg. 71156 (Dec. 1, 2014) (to be codified at 21 C.F.R. part 101).

¹⁷⁹ *Id.* at 71240.

¹⁸⁰ 21 C.F.R. § 101.11(a). In addition, restaurants that are not within the scope of the rule may voluntarily elect to register as a covered establishment and then are subject to the requirements of the menu labeling law. *Id.* § 101.11(d).

¹⁸¹ *Id.* § 101.11(a). "Restaurant-type food" includes food that is "[u]sually eaten on the premises, while walking away, or soon after arriving at another location" and is either served in the establishment or is processed or prepared in the establishment for consumption at another location. *Id.*

stores, retail confectionary stores, superstores, quick service restaurants, and table service restaurants.¹⁸²

The rule also clarifies that “offering for sale substantially the same menu items” means “offering for sale a significant proportion of menu items that use the same general recipe and are prepared in substantially the same way with substantially the same food components, even if the name of the menu item varies.”¹⁸³

The final rule applies to a wide-ranging group of establishments, yet the rule does include numerous exemptions. For example, schools,¹⁸⁴ airplanes, trains and food trucks are excluded.¹⁸⁵ In addition, covered food establishments do not have to label various food items, including temporary items that are offered fewer than sixty days, condiments, market test items that are offered fewer than ninety days, custom orders that deviate from the standard menu item (e.g., no bacon on a tuna bacon melt sandwich), and daily specials.¹⁸⁶ Alcoholic beverages, which were previously exempted under the proposed menu labeling regulations, are no longer exempted unless the beverages are on display and not for self-service.¹⁸⁷ Additionally, food items that will be eaten over the course of multiple occasions (e.g., whole cakes); food items sold by weight e.g., deli salads); or food items that require additional preparation (e.g., deli meats) are exempted from labeling requirements.¹⁸⁸

Covered establishments are required to provide the calorie information for foods that appear as a standard menu item, unless one of the previous exceptions apply. Specifically, the establishments must clearly and conspicuously provide the calorie information on the menu or menu board next to the item.¹⁸⁹ For self-service foods or items on display (e.g., salad bars), the calorie information must be placed on a sign adjacent to the item.¹⁹⁰ The final rule comprehensively details the labeling requirements for variable menu items, where a standard menu item comes in different varieties, flavors or combinations but is listed as a single menu item.¹⁹¹ For standard menu items that have multiple servings, such as an entire pizza, the establishment must list the calorie information for the whole item, but the calorie information for a discrete individual serving may be listed as long as the calorie information for the individual serving is listed along with the total discrete servings (e.g., whole pizza: 200 calories/slice; 8 slices) for the item and as long as the item is usually prepared and offered for sale in discrete individual servings.¹⁹²

Furthermore, the menu or menu board must include the following succinct statement regarding daily caloric needs: “2,000 calories a day is used for general nutrition advice,

¹⁸² 79 Fed. Reg. at 71157. As discussed in this article, grocery and convenience store owners opposed being included within the menu labeling law’s constraints. *See supra* notes 33-34 and accompanying text. Ultimately, however, the owners lost their battle and must now comply with the law.

¹⁸³ 121 C.F.R. § 101.11(a). The rule provides the example “Bay View Crab Cake” and “Ocean View Crab Cake.” *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ 79 Fed. Reg. at 71171. Trains, airplanes and food trucks do not fit within the definition of covered establishment because they do not have a fixed “location” as defined by the rule. *Id.*

¹⁸⁶ 121 C.F.R. § 101.11(b)(1)(ii).

¹⁸⁷ *Id.* § 101.11(b)(1)(ii)(B); 79 Fed. Reg. at 71185-86.

¹⁸⁸ 79 Fed. Reg. at 71170.

¹⁸⁹ 21 C.F.R. § 101.11(b)(2)(i)(A).

¹⁹⁰ *Id.* § 101.11(b)(2)(iii). Additionally, as long as certain requirements are met, the rule allows the information to be placed on a sign attached to a sneeze guard or a sign listing the calorie information for several items. *Id.* § 101.11(b)(2)(iii)(A).

¹⁹¹ *Id.* § 101.11(b)(2)(i)(A)(4).

¹⁹² *Id.* § 101.11(b)(2)(i)(A).

but calorie needs vary.”¹⁹³ The menu or menu board must also include the statement “Additional nutrition information available upon request,” and the establishment must provide this additional information should a customer request it.¹⁹⁴

Now that the final rule for menu labeling has been released and considered, the analysis and conclusions of this article remain impervious and are in fact further strengthened – the menu labeling law, which will be a costly burden to the covered establishments, offers no correlating benefit to the majority of consumers who will ignore the labeling; thus, the law should be repealed. In fact, the final rule broadly defines covered establishments to not only include restaurants but also includes grocery store delis, movie theaters, and amusement parks, thereby significantly increasing the regulatory costs for these establishments. Consumers, who are very unlikely to decline partaking of buttery popcorn at the movie theater, should beware – higher prices are coming to a theater near you.

¹⁹³ *Id.* § 101.11(b)(2)(i)(B).

¹⁹⁴ *Id.* § 101.11(b)(2)(i)(C). As part of the “additional nutrition information,” establishments must provide the total calories, calories from fat, total fat, saturated fat, trans fat, cholesterol, sodium, total carbohydrates, fiber, sugars, and protein. *Id.* § 101.11(b)(2)(ii)(A).