

The Center For Consumer Freedom

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Testimony before the New York City Department of Health and Mental Hygiene Board of Health concerning its intention to repeal and reenact §81.50 of the New York City Health Code

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Good morning. Before I begin, I'd like to thank the Board for allowing me to address its consideration of mandating nutrition information on restaurant menus and menu boards.

My name is J. Justin Wilson. I am a Senior Research Analyst at the Center for Consumer Freedom, a nonprofit organization that promotes personal responsibility and consumer choice.

In that capacity, I've spent the last three years studying the costs, causes, and potential policy solutions to the nation's burgeoning waistlines. After examining thousands of studies and writing two books on the issue, it is clear to me that the policy proposed today is based on a series of false assumptions and unproven theories that will have little impact on the city's obesity rates, but will no doubt spawn untold frivolous lawsuits against the city's restaurant community.

To begin, I challenge the Board's assertion that restaurants in general—and chain restaurants in particular—are disproportionate contributors to the city's growing waistlines.

Even the Board's own documentation does not support this position, which is especially significant considering that it was the trigger for today's hearing.

As the Board plainly states, only one-third of calories are consumed at restaurants, and only 10% of those restaurants meet the Board's standard definition of a chain.

Thus, calories consumed at the City's chain restaurants could account for as little as 3% of an average New Yorker's diet.

More importantly, the Board's analysis seems to ignore the complicated relationship between food, exercise, and the numerous other factors that significantly contribute to increased rates of obesity. Recent research suggests that while excess eating can be a factor, it is only one among many that ultimately contribute to obesity.

**How can the Board contend that just 3% of calories are the primary cause of obesity?
The bottom line is simple: it can't.**

It would appear that even Dr. Frieden recognizes that menu labeling won't work. In a recent interview on *60 Minutes*, Lesley Stahl reports that he admitted that menu labeling is worth a try even if there is little scientific evidence to suggest that menu labeling will be effective.

Dr. Frieden is not alone in questioning the effectiveness of his own policy. In fact, numerous clinical trials and observational studies have come to the same conclusion: Providing nutrition information does not influence an individual's caloric intake.

A recent study published in the *Journal of the American Dietetic Association* determined that:

“...pilot data suggest that the recent legislation advocating for greater labeling of restaurant food may not be particularly effective in combating the obesity epidemic if people are not looking at existing food labels and are not able to use this information for nutrition planning.”

And researchers from the University of Vermont write:

“Despite the growing push for such legislation to be developed, and more importantly, the need for research in the area that has been identified, there has been no research demonstrating the impact that food labeling will have on consumer behavior with respect to eating out.”

While some surveys indicate support for menu labeling, a study in the September 2007 edition of the *American Journal of Preventative Medicine* explains that what consumers say in a survey is much different than what they ultimately order. The researchers wrote:

“Consumers claim that they want healthier choices at restaurants, but purchase more indulgent fare when they eat out.”

A 2006 study conducted by researchers from Purdue University asked respondents what they would like to see added to restaurant menus. Only **8 percent** indicated they wanted calorie information.

More important to this debate is the detrimental effect mandatory nutrition labeling will have on New Yorkers' eating habits as well as the city's restaurants.

Better put, the Board should be careful what it wishes for.

Former Food and Drug Administration Commissioner Lester Crawford suggests looking at packaged food labeling as a model for restaurant menu labels. He recently observed:

“What we did in making nutrition labeling mandatory did not help obesity. In fact, some people would say it hurt.”

Beyond the fact that nutritional information on packaged foods has had little to no effect on obesity rates, Crawford is reflecting on a phenomenon called the “health halo,” which was coined by the incoming Executive Director of the USDA Center for Nutrition Policy and Promotion, Dr. Brian Wansink.

Dr. Wansink's research indicates that consumers eat "compensation calories" after eating a meal they perceived to be healthy. For instance, in one of his studies, Subway customers ultimately ate more calories than those who ate at a McDonald's. Wansink explains: "If [customers] believe they ate this nice, healthy lunch, they're more likely to eat snacks and eat more calories of it later on in the day."

Beyond the potential for creating counterproductive "health halos" around certain menu items, **the Board's menu labeling mandate fails to provide a realistic litigation "safe harbor" for recipe variances.**

Specifically, the proposal fails to explicitly outlaw private action against restaurants by trial lawyers, as many other proposals have done.

As I'm sure you're aware, a cadre of lawyers—including some from the Center for Science in the Public Interest—have demonstrated their eagerness to sue restaurants for a variety of dubious legal claims, including failure to post nutrition information.

It also fails to provide a realistic safe harbor to account for recipe variance. Unlike packaged food companies which enjoy a 20% legal cushion, restaurants do not rely on assembly lines to prepare their food. As a recent study by the Center for Science in the Public Interest indicates, restaurant nutrient content can legitimately vary by as much as 50% or more from the average caloric content of a meal.

Finally, it does not set a willful negligence standard for violating the statute.

California's experience with labeling laws should be instructive to the Board. California's Proposition 65, which enables private citizens to sue manufacturers for failing to warn against potentially carcinogenic products, has created an entire industry of lawyers who file hundreds of lawsuits each month against manufacturers whose products contain perfectly safe trace amounts of various chemicals.

Without addressing the proposal's numerous deficiencies, the Board risks exposing the city's restaurants to a legal quagmire that will likely put an undue financial hardship on businesses which already operate on small profit margins.

If the Council is serious about having an impact on obesity rates, politically expedient solutions that ignore the numerous causes of obesity will surely fail.

Thank you. I am happy to answer any questions you might have.

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