

# THE INFORMED CONSUMER IS A HEALTHY CONSUMER? THE AMERICAN OBESITY EPIDEMIC AND THE FEDERAL MENU LABELING LAW

*Katherine Wilbur\**

## *Introduction*

After the recent passage of the Patient Protection and Affordable Care Act (“Healthcare Act” or “Act”) on March 23, 2010,<sup>1</sup> legislators and political figures continue to debate whether the Act is economically feasible, whether government regulation of healthcare is constitutional, and whether the Act should ultimately be repealed or left unfunded. Amid the recent controversy over the health insurance related portions of the Act, many unrelated portions have been overlooked despite their potential to change America into a healthier nation. Specifically, Congress has mandated that restaurants and similar retail food stores with twenty or more locations and substantially the same menu items must provide an approximate calorie value for each of the restaurant’s food and drink offerings on its menu board, individual menu, or drive thru menu (“federal menu labeling law”).<sup>2</sup>

This new effort to inform and empower consumers to take control of their health has been met with mixed reviews.<sup>3</sup>

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\* J.D. Candidate, May 2012, Loyola University Chicago School of Law; B.A., Art History, International Studies, 2009, Hope College.

<sup>1</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>2</sup> Patient Protection and Affordable Care Act § 4205.

<sup>3</sup> 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 AFFAIRS 1110 (2009) (last visited Mar. 16, 2011), available at <http://content.healthaffairs.org/content/28/6/w1110.abstract>; see also Christina A. Roberto et al., *Evaluating the Impact of Menu Labeling on Food Choices and Intake*, 100 AM. J. OF PUB. HEALTH 312 (2010), available at <http://ajph.aphapublications>

Recently, the debate over the new Healthcare Act has intensified, with some politicians calling for its complete repeal.<sup>4</sup> Although a complete repeal would include the portions of the Act that provided for the federal menu labeling law, most plans for repeal and defunding focus on the insurance related portions of the law. Thus, the forthcoming nationwide menu labeling law seems as if it is here to stay and is likely to have a great impact on the way consumers experience restaurants.

The first goal of the new federal menu labeling law is to help improve public health in America.<sup>5</sup> In a nation that values personal autonomy, menu labeling laws allow consumers to take personal responsibility for their health. The law simultaneously empowers consumers to make healthier choices by giving them adequate and correct information about their food's nutritional content while also leaving consumers free to make their own dietary decisions. Moreover, the menu labeling laws may additionally benefit American consumers by reducing the Government's burden of providing funding for obesity-related healthcare.

Part I of this Note will provide a brief overview of the current status of the obesity epidemic in America as well as the role that increased restaurant patronage plays in causing this epidemic. Part II will provide an overview of the history behind America's previous attempts at improving public health through governmental regulation of the food service industry. Part II will then introduce the new federal menu labeling law as America's newest measure to fight obesity. Part III will discuss and weigh the arguments for and against implementing the federal menu labeling law. Part IV will consider additional alternatives or supplements to menu labeling that may improve public health such as the so-called "soda tax," insurance penalties for individuals considered "obese," and efforts to increase access to healthier foods in lower-income communities such as the Healthy

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.org/cgi/content/abstract/100/2/312 (last visited Mar. 16, 2011).

<sup>4</sup> See *Florida v. U.S. Dep't. of Health & Human Servs.*, 2011 WL 285683 (N.D. Fla. 2011) (holding entire statute unconstitutional because the individual mandate is unconstitutional and not severable); see also Press Release, Capitol Hill on MSNBC.com, House Passes Bill to Cut \$60 Billion in Spending (Feb. 19, 2011), [http://www.msnbc.msn.com/id/41660795/ns/politics-capitol\\_hill/?GT1=43001](http://www.msnbc.msn.com/id/41660795/ns/politics-capitol_hill/?GT1=43001) (last visited Mar. 16, 2011) (reporting plans to stop the Healthcare Act from being implemented focus on defunding the provisions related to insurance).

<sup>5</sup> 21 U.S.C. § 343 (q)(5)(H).

2011] *The Informed Consumer is a Healthy Consumer?* 507

Foods Financing Initiative or subsidies for the production of fresh fruits and vegetables. Finally, Part V proposes an alternative solution aimed at improving the health of the American consumer: a combination of menu labeling, subsidies for healthy food producers, and governmental incentives for those supermarkets and restaurants featuring healthy food choices, located in neighborhoods at risk for obesity.

### *I. Overview*

#### *A. An American Epidemic*

Obesity rates in America continue to soar.<sup>6</sup> Obesity is defined as “the condition of having an abnormally high proportion of body fat,” or more specifically, when body fat content exceeds 30% for women or 25% for men.<sup>7</sup> According to the 2008 National Health and Nutrition Examination Surveys, approximately 68% of adults are overweight or obese – with over seventy-five million adults actually considered obese.<sup>8</sup> The most recent studies have found that the condition of being overweight or obese affects certain minorities, such as African Americans and Hispanics, more than others.<sup>9</sup> For example, African American communities had a 51% higher incidence of obesity, and Hispanics had a 21% higher incidence of obesity as compared to white communities.<sup>10</sup> Nor is this epidemic confined to adults.<sup>11</sup>

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<sup>6</sup> Nat’l Heart Lung and Blood Inst., *Clinical Guidelines on the Identification, Evaluation, and Treatment of Overweight and Obesity in Adults: The Evidence Report*, NIH PUB. NO. 98-4083, xi, (1998), available at [http://www.nhlbi.nih.gov/guidelines/obesity/ob\\_gdlns.pdf](http://www.nhlbi.nih.gov/guidelines/obesity/ob_gdlns.pdf) (last visited Mar. 16, 2011) [hereinafter *Clinical Guidelines*].

<sup>7</sup> *Id.* at 174. Medical experts use the measurement device of the “BMI” or “body mass index” when determining whether a person should be considered as obese. *Id.* BMI is found by dividing an individual’s body weight in kilograms by his or her height in meters squared. *Id.* A person considered obese is generally defined by medical experts as having a BMI equal to or higher than thirty. *Id.* A BMI of thirty is roughly equivalent to being thirty pounds overweight. *Id.*

<sup>8</sup> Press Release, Nat’l Heart Lung and Blood Inst., Why Obesity is a Health Problem, <http://www.nhlbi.nih.gov/health/public/heart/obesity/wecan/healthy-weight-basics/obesity.htm> (last visited Mar. 16, 2011).

<sup>9</sup> *Id.*

<sup>10</sup> Press Release, Ctrs. for Disease Control and Prevention, U.S. Obesity Trends: Trends by State 1985-2009, <http://www.cdc.gov/obesity/data/trends.html> (last visited Mar. 16, 2011).

<sup>11</sup> *Clinical Guidelines*, *supra* note 6.

Over the past thirty years, the prevalence of childhood obesity has more than doubled among children between the ages of two to five, tripled among children between the ages of six to eleven, and tripled among adolescents and teens between the ages of twelve to nineteen.<sup>12</sup> The statistics confirming the growth in childhood obesity are particularly frightening as they show the precarious health of our nation's youth and indicate that obesity will continue to be a challenge for years to come.

This rise in obesity has resulted in preventable suffering and enormous costs to American society as a whole. Obesity is the second most common cause of preventable death in the United States today.<sup>13</sup> Preventable diseases, whose onset is related to obesity, are on the rise and may soon overwhelm America's healthcare system. Overweight and obese children and adults suffer from increased occurrences of many familiar and notorious diseases such as cardiovascular disease, type II diabetes, high blood pressure, certain cancers, and various other chronic conditions.<sup>14</sup> The estimated costs for obesity-related diseases include: \$63.14 billion for type II diabetes, \$17.2 billion for osteoporosis, \$3.23 billion for hypertension, and \$6.99 billion for heart disease.<sup>15</sup> According to a national study, obesity-related medical expenses accounted for approximately 9% of total U.S. medical expenditures in 1998, or \$78.5 billion.<sup>16</sup> Furthermore, the study predicts that by 2030 these costs may increase to somewhere between \$860.7 and \$956.9 billion.<sup>17</sup> Approximately half of these costs were attributable to an increasingly overweight

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<sup>12</sup> *Id.*

<sup>13</sup> Press Release, Get Fit America Found., Obesity Related Statistics in America, <http://www.getamericafit.org/statistics-obesity-in-america.html> (last visited Mar. 16, 2011).

<sup>14</sup> *Clinical Guidelines*, *supra* note 6.

<sup>15</sup> Get Fit America Found., *supra* note 13.

<sup>16</sup> Eric A. Finkelstein et al., *National Medical Spending Attributable To Overweight And Obesity: How Much, And Who's Paying?* 3 HEALTH AFFAIRS 219, 224 (2003), available at <http://content.healthaffairs.org/content/early/2003/05/14/hlthaff.w3.219?searchid=1&HITS=10&hits=10&resourcetype=HW CIT&maxtoshow=&RESULTFORMAT=&andorexactfulltext=and&author1=Finkelstein&FIRSTINDEX=0&fulltext=national%20medical%20spending%20obesity> (last visited Mar. 16, 2011).

<sup>17</sup> Youfa Wang et al., *Will All Americans Become Overweight or Obese? Estimating the Progression and Cost of the US Obesity Epidemic*, 16 OBESITY 2323, 2328 (2008). The study used data compiled from the National Health and Nutrition Examination Survey, which is an annual national survey of Americans' height and weight based on direct physical examinations. *Id.* at 2324.

2011] *The Informed Consumer is a Healthy Consumer?* 509

and obese population whose bills are paid by Medicaid and Medicare. Thus, the bulk of these financial costs will fall upon the American taxpayer.<sup>18</sup> Another overwhelming cost to society attributable to the rise in obesity includes the loss of productivity of the American workforce. It has been estimated that workdays lost because of obesity cost American citizens approximately \$39.9 million, physician office visits related to obesity cost the American workforce another \$62.7 million, and the restricted activity of obese workers cost another \$29.9 million.<sup>19</sup> To put these figures into perspective, in 2008, obesity cost the state of Indiana an estimated \$435 per adult.<sup>20</sup> Health officials have predicted that if obesity remains unchecked, this number could rise to \$1,484 per adult by the year 2018.<sup>21</sup>

#### B. The Role of Restaurants in Contributing to the Increased Incidence of Obesity in America

More Americans eat at restaurants than ever before and this increased patronage has had a close correlation to the rise in obesity.<sup>22</sup> The restaurant industry is now the nation's largest private sector employer, and, in 2010, Americans spent approximately 49% of their food dollar at restaurants.<sup>23</sup> The most commonly villainized restaurants associated with increased calorie consumption are those specializing in fast food, which represent approximately 74% of all restaurant traffic nationally.<sup>24</sup> Every day, approximately one out of every four American adults

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<sup>18</sup> Finkelstein et al., *supra* note 16, at 222-24; Tamara Schulman, *Menu Labeling: Knowledge for a Healthier America*, 47 HARV. J. ON LEGIS. 587, 591 (2010).

<sup>19</sup> Get Fit America Found., *supra* note 13.

<sup>20</sup> Shari Rudavsky, *State Has A Plan To Shrink Adult Obesity*, INDY STAR, Jan. 28, 2011.

<sup>21</sup> *Id.*

<sup>22</sup> According to the National Restaurant Association, the restaurant industry is growing rapidly, employing 12.8 million Americans in 960,000 locations. National Restaurant Association, *About Us*, <http://www.restaurant.org/aboutus/> (last visited Mar. 16, 2011). In 2010, the association expects restaurant sales to reach over \$604 billion. *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Mary T. Bassett et al., *Purchasing Behavior and Calorie Information at Fast-Food Chains in New York City*, 98 AM. J. PUB. HEALTH 1457, 1457-59 (2008), available at [http://www.publichealthadvocacy.org/printable/CCPHA\\_NYC2007CalorieInfo.pdf](http://www.publichealthadvocacy.org/printable/CCPHA_NYC2007CalorieInfo.pdf) (last visited Mar. 16, 2011) (reportedly purchasing meals with 714 calories versus 766 calories).

visits a fast food restaurant.<sup>25</sup> These restaurants serve food “designed to promote consumption for the maximum amount of energy in a minimum amount of time.”<sup>26</sup> Fast food meals contain high energy density, low fiber, and low satiating value components.<sup>27</sup> These nutritionally unsatisfying components lead to more consumption and more weight gain than that which would occur when consuming other food.<sup>28</sup> In one study, those who ate at fast food restaurants more than twice each week, as compared to those who ate there less than once per week, had gained an extra ten pounds and had a two-fold greater increase in insulin resistance, a factor for type II Diabetes.<sup>29</sup>

Although consumers generally have background knowledge on which basic foods are healthy, it can be particularly difficult to accurately judge which meals are healthier and contain fewer calories when the consumer does not know how meals are prepared. Few people would guess that a small milkshake has more calories than a Big Mac at McDonald’s.<sup>30</sup> Identifying a healthy option, especially at fast food restaurants, can be particularly challenging for a consumer when these restaurants do not provide nutritional information. For example, the obviously high-calorie Burger King “BK Quad Stacker” hamburger features four stacked beef patties and contains 920 calories.<sup>31</sup> The Food and Drug Administration (“FDA”) generally recommends that an adult only consume approximately 2,000 calories per day.<sup>32</sup> Here, it is easy to see how when ordering such foods at a fast food restaurant one may consume more than the recommended amount of calories for that

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<sup>25</sup> ERIC SCHLOSSER, FAST FOOD NATION 3 (2001).

<sup>26</sup> Schulman, *supra* note 18, at 595.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Press Release, U.S. Dep’t. of Health and Human Servs., NIH News, Eating at Fast-food Restaurants More than Twice Per Week is Associated with More Weight Gain and Insulin Resistance in Otherwise Healthy Young Adults (Dec. 30, 2004), *available at* <http://www.nih.gov/news/pr/dec2004/nhlbi-30.htm> (last visited Mar. 16, 2011) [hereinafter *NIH News*]; *see also* Mark Pereira et al., *Fast-food Habits, Weight Gain, and Insulin Resistance (The CARDIA Study): 15-Year Prospective Analysis*, THE LANCET, Jan. 1, 2005.

<sup>30</sup> Center for Science in the Public Health, *Menu Labeling*, <http://www.cspinet.org/menulabeling> (last visited Mar. 16, 2011).

<sup>31</sup> Press Release, Burger King, Menu & Nutrition, <http://www.bk.com/en/us/menu-nutrition/index.html> (last visited Mar. 16, 2011).

<sup>32</sup> Food & Drug Admin., *How to Understand and Use the Nutrition Facts Label*, <http://www.fda.gov/Food/LabelingNutrition/ConsumerInformation/ucm078889.htm#see2> (last updated Mar. 11, 2011).

2011] *The Informed Consumer is a Healthy Consumer?* 511

day. The “BK Quad Stacker,” however, may not be the first selection for a health conscious consumer, as many consumers may be able to distinguish simply by the dish’s name alone that it probably contains an excessive amount of calories for a simple sandwich.<sup>33</sup> Thus, a health-conscious consumer may instead choose what may be commonly perceived as a lower calorie option from the menu, such as a chicken sandwich with only one layer of meat. However, this same consumer would then be surprised to discover that the Burger King “Tendercrisp” chicken sandwich contains a whopping 800 calories,<sup>34</sup> especially in light of the fact that a typical home-prepared chicken sandwich may only contain 265 calories depending on how it is prepared.<sup>35</sup> Because these restaurants’ menus generally feature high-fat, high-calorie foods, many consumers find it difficult to eat low-calorie, but filling, meals when patronizing such restaurants.<sup>36</sup>

However, fast food restaurants are not the only culprit for the increased calorie intake of the population. Many sit-down restaurants similarly feature foods that contain a deceptively high amount of calories. One study even found that adolescents, who ate at popular sit-down chain restaurants such as Chili’s, Denny’s, and Outback Steakhouse, consumed more calories than adolescents who ate at fast food restaurants.<sup>37</sup> These types of popular, sit-down, chain restaurants have similarly contributed to the rise in obesity by using more butter, oil, salt and similar ingredients to cook their meals than the same recipe would call for at home.<sup>38</sup> Also, restaurant portion sizes have ballooned from

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<sup>33</sup> *Id.*

<sup>34</sup> Burger King, *supra* note 31.

<sup>35</sup> U.S. Dep’t of Agric., *What’s in the Foods You Eat*, [http://reedir.arsnet.usda.gov/codesearchwebapp/\(xpfqt345gybqbnfxrli5155\)/measures.aspx?id=27540110](http://reedir.arsnet.usda.gov/codesearchwebapp/(xpfqt345gybqbnfxrli5155)/measures.aspx?id=27540110) (last visited Mar. 16, 2011).

<sup>36</sup> *NIH News*, *supra* note 29.

<sup>37</sup> See Julienne A. Yamamoto et al., *Adolescent Calorie/Fat Menu Ordering at Fast Food Restaurants Compared to Other Restaurants*, 65 HAW. MED. J. 231, 232-34 (2006), available at [http://www.hawaiiimediicaljournal.org/HMJ\\_Aug06.pdf](http://www.hawaiiimediicaljournal.org/HMJ_Aug06.pdf) (last visited Mar. 16, 2011). In the study, adolescents aged eleven to eighteen years of age were given restaurant menus and asked to order a dinner meal. This was repeated for ten different restaurants. The calories and fat of each meal ordered was recorded and the mean number of calories for the groups was compared to that of the orders for McDonald’s. The mean number of calories per order at Outback Steakhouse was 1656, 1016 at Red Lobster, 1333 at Chili’s, 1226 at Denny’s, and 1016 at McDonald’s. *Id.* In fact, the FDA recommends that an adult only consumer approximately 2,000 calorie per day diet. Food & Drug Admin., *supra* note 32.

<sup>38</sup> Devon E. Winkles, *Weighing the Value of Information: Why the Federal*

500 calories per meal to approximately 1,200.<sup>39</sup> For example, an average blueberry muffin from a restaurant has gone from 1.5 ounces to 5 ounces and from 210 calories to around 500 calories.<sup>40</sup> Restaurant portion sizes have spiraled out of control; and with more consumers eating out, more consumers are bound to gain weight.

Even so-called “healthy” restaurants known for their low-calorie options may be contributing to the obesity epidemic by causing consumers to overestimate the healthy aspects of dishes not directly featured as “healthy.”<sup>41</sup> For example, one study showed that commonly perceived “healthy” restaurants such as Subway might have a distorting effect on food choice.<sup>42</sup> In that study, participants were given a choice between a Subway ‘submarine’ sandwich and a McDonald’s Big Mac that contained fewer calories than the Subway sandwich. Those participants who chose the sandwich over the Big Mac were more likely to add a large non-diet soda and cookies to their order resulting in an average of 56% more calories than the McDonald’s meal.<sup>43</sup> Despite many restaurants’ recent attempts at healthy offerings, most of their menus still include “regular” menu items that are high in fat, sugar, and calories, and low in fiber and nutrients.<sup>44</sup>

Moreover, restaurants have no duty to disclose nutritional information until the menu labeling rules are implemented.<sup>45</sup> This creates an obvious gap in information for the consumer.<sup>46</sup> Thus, this information gap, combined with larger portion sizes and food preparation techniques that differ from those consumers are familiar with, make it difficult for any consumer to accurately

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*Government Should Require Nutrition Labeling For Food Served in Restaurants*, 59 EMORY L.J. 549, 560 (2009).

<sup>39</sup> Jeffrey Kluger, *Obesity: The First Lady Takes on the NRA (No, Not That NRA)*, TIME, Feb. 7, 2011, available at <http://healthland.time.com/2011/02/07/obesity-the-first-lady-takes-on-the-nra-no-not-that-nra/>.

<sup>40</sup> *Id.*

<sup>41</sup> Michelle I. Banker, *I Saw the Sign: The New Federal Menu labeling Law and Lessons From Local Experience*, 65 FOOD & DRUG L. J. 901, 913-17 (2010).

<sup>42</sup> Winkles, *supra* note 38, at 560-61.

<sup>43</sup> *Id.*

<sup>44</sup> *NIH News*, *supra* note 29.

<sup>45</sup> Press Release, Food & Drug Admin., Report of the Working Group on Obesity: Appendix G- Report of Market Studies Office of Scientific Analysis and Support (Dec. 28, 2003), <http://www.fda.gov/Food/LabelingNutrition/ReportsResearch/ucm081998.htm> (last updated July 18, 2009) [hereinafter *Report of the Working Group on Obesity*].

<sup>46</sup> *Id.*

2011] *The Informed Consumer is a Healthy Consumer?* 513

determine which restaurant foods will be the lowest calorie and most nutritious.<sup>47</sup> In this way, consumers may underestimate the amount of calories in their meals.

## *II. The Federal Government and The Obesity Epidemic*

### A. An Overview of Various Laws Aimed At Improving Public Health

The question thus becomes: what has the government done to stop the obesity epidemic and why has nationally mandated menu labeling taken so long to become federal law? The Federal Government has the power to regulate food products in the interest of public health and safety.<sup>48</sup> The government values protecting the reasonable expectations of consumers regarding their food products and has promulgated legislation in the past to protect consumers from being duped.<sup>49</sup> One example was the Filled Milk Act, which was designed to prevent the sale of imitation “filled-milk” products being passed off as regular milk.<sup>50</sup> However, the first noteworthy step on the way to menu labeling was Congress’ passage of the Nutrition Labeling Education Act of 1990 (“NLEA”), which amended the Federal Food, Drug, and Cosmetic Act (“FDCA”). Before the NLEA, nutrition labeling was only required in certain instances, such as when a product contained added nutrients, or a food manufacturer made specific claims about its product’s nutritional content.<sup>51</sup> The NLEA requires food product manufacturers to provide nutrition labels for most items sold in retail food stores and gave the FDA authority to require these nutrition labels.<sup>52</sup> Furthermore, the NLEA added two subsections to section 403 of the FDCA creating two new food labeling provisions.<sup>53</sup> The first

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<sup>47</sup> *Id.*

<sup>48</sup> *U.S. v. Walsh*, 331 U.S. 432, 434 (1947) (upholding the Federal Food, Drug, and Cosmetic Act as a valid exercise of Congress’ power to regulate interstate commerce).

<sup>49</sup> Filled Milk Act, 21 U.S.C. § 61-63 (1923) (prohibiting the shipment of filled milk products in interstate commerce. This Act was designed to prevent the sale of this “filled milk” made with non-milk compounds like cod liver oil, cottonseed oil, coconut oil, and fish liver oil, which lent themselves readily to substitution for or confusion with milk products).

<sup>50</sup> *Id.*

<sup>51</sup> *Report of the Working Group on Obesity*, *supra* note 45.

<sup>52</sup> *See* 35A AM. JUR. 2D FOOD § 23 (2010).

<sup>53</sup> Nutrition Labeling and Education Act of 1990, Pub L. No. 101-535, 104

subsection created the general nutrition labeling standards and requirements,<sup>54</sup> and the second limited the ability of food manufacturers to make unsubstantiated claims regarding the health of their products.<sup>55</sup> The “Nutrition Facts” label that the NLEA requires on all packaged foods states the standard serving size for the product, the number of calories per serving, and the percentage of the daily value per serving for specified nutrients.<sup>56</sup> Despite this Act’s broad powers to mandate and regulate labeling of food products, restaurants were largely excluded from its scope.<sup>57</sup>

In addition to the Nutrition Facts label, the FDA permits specific nutrient content claims on packaged foods such as “low-fat” or “low-calorie.”<sup>58</sup> Later, in response to the practice of many manufacturers to label certain products as “low-fat” when undeserving of the title, the FDA promulgated additional regulations concerning when a food label might employ the words “light,” “low-calorie,” or “low-fat” to market and describe their foods.<sup>59</sup> These regulations were designed, like menu labeling laws, to inform the consumer and empower him to make intelligent, healthy, food choices.

Many state and local governments have also played a large role in the movement to enact federal menu labeling laws by pioneering this type of legislation and enacting similar rules in their own jurisdictions. State and local governments have the power to enact laws promoting the public health of their citizens as part of their police power. In December 2006, New York City exercised this power to regulate for the public health and became the first city to adopt menu labeling laws.<sup>60</sup> Two years later in 2008, California followed suit and became the first state to adopt

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Stat. 2353, 2353 and 2357 (1990); 21 U.S.C. § 343(q), (r).

<sup>54</sup> Nutrition Labeling and Education Act of 1990 § 343(q).

<sup>55</sup> *Id.* § 343(r).

<sup>56</sup> *Report of the Working Group on Obesity, supra* note 45.

<sup>57</sup> See 35A AM. JUR. 2D FOOD § 23; see also 21 C.F.R. § 101.9(j)(2)(i) (2011); *Cohen v. McDonald’s Corp.*, 347 Ill. App. 3d 627, 637-38 (Ill. App. Ct. 2004) (noting that no labeling of menu items is required by the federal government or the NLEA, and thus the court would not require labeling of certain menu items in the absence of federal government action, stating “[t]his is state court, not the FDA.”).

<sup>58</sup> *Report of the Working Group on Obesity, supra* note 45.

<sup>59</sup> 21 C.F.R. § 101.13 (1993).

<sup>60</sup> New York City, N.Y., Health Code tit. 24, § 81.50 (2008); see also *Banker, supra* note 41, at 907.

2011] *The Informed Consumer is a Healthy Consumer?* 515

state-wide menu labeling laws.<sup>61</sup> In addition to California, Massachusetts, Maine, Oregon, and New Jersey, joined by various other municipalities across the nation, have also promulgated regulations or enacted statutes requiring menu labeling.<sup>62</sup> Although all of these laws require that the consumer be informed about the amount of calories their meals contain, many of them vary in terms of the scope of the restaurants they cover, the specific nutrition facts that must be disclosed, where and how the information must be disclosed to the customer, and how they deal with special food service situations such as buffets or drive thru restaurants.<sup>63</sup> Thus, these state and local laws served as a ready template for the Federal Government's attempts at menu labeling.<sup>64</sup>

Litigation has also contributed to the development of the federal menu labeling law and the regulation of the restaurant industry. In 2003, two obese teens brought a class action lawsuit against the fast food restaurant McDonald's for allegedly causing them to become obese and gravely ill due to the consumption of McDonald's food products.<sup>65</sup> More specifically, the plaintiffs claimed first that McDonald's misled them through the use of deceptive marketing campaigns to believe that its food products were nutritious and safe for daily consumption; second, that McDonald's failed to disclose the health risks associated with its products; third, that had the plaintiffs known these risks they would not have consumed the products; and lastly, that McDonald's engaged in unfair and deceptive acts by erroneously representing that it provides nutritional brochures and information in all of its restaurants.<sup>66</sup> The claim ultimately was

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<sup>61</sup> Banker, *supra* note 41, at 908.

<sup>62</sup> *Id.* at 908-09.

<sup>63</sup> *Id.* at 909-11.

<sup>64</sup> See Helena Bottemiller, *Health Bill Mandates Calorie Labeling on Menus*, FOOD SAFETY NEWS, <http://www.foodsafetynews.com/2010/03/health-bill-mandates-calorie-labeling-for-menus/> (last visited Mar. 17, 2011).

<sup>65</sup> *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512, 512-18 (S.D.N.Y., 2003). In 2005, a bill was passed in the House but ultimately expired in the Senate in response to a class action obesity suit against McDonald's. The bill was re-submitted in 2007 and known as the Commonsense Consumption Act because fostering a culture and personal responsibility is one of the most important ways to promote a healthier society. See generally *'Cheeseburger Bill' Puts Bite on Lawsuits*, CNN, (Oct. 20, 2005), <http://www.cnn.com/2005/POLITICS/10/20/cheeseburger.bill/index.html> (last visited Mar. 17, 2011); Commonsense Consumption Act of 2007, S. 1323, 110th Cong. (1st Sess. 2007).

<sup>66</sup> *Pelman*, 237 F. Supp. 2d at 527-33.

unsuccessful as the Federal District Court judge held that the teens' own choices had contributed to their obesity and McDonald's bore no duty to protect citizens from "their own excesses."<sup>67</sup> The judge further noted that it was part of "the common knowledge of consumers" that consuming McDonald's products in excess would be dangerous.<sup>68</sup> After examining this case, it is obvious that if the nutritional value of restaurant food is deemed "common knowledge" and that legally, consumers have only themselves to blame for choosing to consume excessive amounts of calories, menu labeling is necessary to truly and fairly place this burden wholly on consumers.

#### B. Section 4205 of the Patient Protection and Affordable Care Act

On March 23, 2010, the Healthcare Act was signed into law. Section 4205 of the Act amended section 403(q)(5) of the FDCA by creating a new clause (H) which built upon state and local menu labeling laws by requiring chain restaurants and certain vending machines to post calorie content information "in a clear and conspicuous manner" on their menus, menu boards, and drive-thru displays.<sup>69</sup> The Act also required the Secretary of Health and Human Services to issue a proposed regulation to carry out this clause and resolve any gray areas in the law.<sup>70</sup> This ground-breaking federal law melded much of the best language from two previous unsuccessful proposals by members of Congress to implement a menu labeling scheme.<sup>71</sup> It was designed

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<sup>67</sup> *Id.* at 517-18, 533.

<sup>68</sup> *Id.* Judge granted plaintiffs permission to re-plead the complaint with greater specificity. Plaintiffs filed an amended complaint and this time the case was dismissed with prejudice. *Pelman ex rel. Pelman v. McDonald's Corp.*, No. 02 Civ. 7821(RWS), 2003 WL 22052778, at \*14-15 (S.D.N.Y., 2003).

<sup>69</sup> 21 U.S.C. § 343(q)(5)(H)(ii)(I)(aa) (2010); 21 U.S.C. § 343(q)(5)(H)(ii)(II)(aa)(2010).

<sup>70</sup> See generally 21 U.S.C. § 343 (q)(5)(H); Dep't of Health and Human Servs., *Guidance for Industry, Section 4205 of The Patient Protection and Affordable Care Act of 2010*, 75 Fed. Reg. 52426 (Aug. 25, 2010), available at <http://edocket.access.gpo.gov/2010/pdf/2010-21065.pdf> (last visited Mar. 17, 2011).

<sup>71</sup> Bottemiller, *supra* note 64; Nat. Assoc. of Convenience Stores Online, *Health Care Bill Includes Menu Labeling* (Dec. 7, 2009), [http://www.nacsonline.com/NACS/News/Daily/Pages/ND\\_1207091.aspx](http://www.nacsonline.com/NACS/News/Daily/Pages/ND_1207091.aspx) (last visited Mar. 17, 2011) (stating that the new bill combines language from the Menu Education and Labeling Act, or the MEAL Act, a bill that had been previously introduced in 2003, and the Labeling Education and Nutrition Act, or the LEAN Act).

2011] *The Informed Consumer is a Healthy Consumer?* 517

to help consumers receive accurate information about the food they choose in restaurants across the country so they could make healthy and informed choices.<sup>72</sup> The Act applies to restaurants and all similar retail food establishments with twenty or more locations featuring the same name and substantially the same menu items.<sup>73</sup> Consequently, most small restaurants, which are likely the same restaurants that might face hardships in implementing the law because of changing menus or a lack of resources, are exempted. The Act applies to those menu items at each location which are considered standard, but only with respect to food and non-alcoholic beverages on the menu.<sup>74</sup> The Act excludes condiments for general use, special menu items served for fewer than sixty days annually, and market test items served for less than ninety days annually.<sup>75</sup>

The Act requires only the calorie content of each item as usually prepared and offered for sale to be provided on the menu or menu board adjacent to the name of the item.<sup>76</sup> In one study, which was limited to chains that made calorie information publically available, less than 5% of patrons saw the calorie information when it was not written on the menu, but was instead provided in less prominent formats such as on charts on counter mats.<sup>77</sup> Therefore, that study concluded that providing only calorie information directly on the menu board or menu where the consumer receives all other information about the item will increase the likelihood that the consumer will notice this information before ordering, and thereafter take it into consideration when selecting a meal. Although there are many factors contributing to the obesity epidemic in recent years, the factor most to blame is increased (and excessive) calorie consumption.<sup>78</sup> In fact, in 2006, Americans consumed

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<sup>72</sup> Beth Martino, *Menu Labeling Provisions: Getting Americans the Facts*, HEALTHCARE.GOV (Sept. 8, 2010), available at <http://www.healthcare.gov/news/blog/menulabeling.html> (last visited Mar. 17, 2011).

<sup>73</sup> Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 4205(b), 124 Stat. 119, 573-76 (2010) (to be codified at 21 U.S.C. § 343(q)(5) (H)(i)).

<sup>74</sup> See generally *id.*; 21 U.S.C. § 343(q)(5)(H); John W. Bode, *Federal Menu Labeling: Presentation to the National Restaurant Association*, (May 22, 2010), available at [http://show.restaurant.org/nra10/Custom/Handout/Speaker0\\_Session207\\_1.pdf](http://show.restaurant.org/nra10/Custom/Handout/Speaker0_Session207_1.pdf) (last visited Mar. 17, 2011).

<sup>75</sup> *Id.*

<sup>76</sup> See Patient Protection and Affordable Care Act § 4205(b).

<sup>77</sup> Bassett, *supra* note 24, at 1457.

<sup>78</sup> European Ass'n for the Study of Obesity, *Increased Food Intake Alone*

approximately seven hundred calories more per capita per day as compared to the 1970s.<sup>79</sup> Many nutrients make up a balanced diet; however, studies have shown that calories are the single most important piece of information necessary to help consumers lose weight.<sup>80</sup> Hence, the menu labeling law focuses foremost on informing consumers about their meal's calorie content by requiring that this information be provided on the place where consumers are most likely to notice it, the menu. This decision to focus on calories is also based on statistics showing that a bombardment of additional nutritional information may cause a desensitization of consumers to nutrition information, and may even cause them to become distracted and overeat.<sup>81</sup>

According to the Act, restaurants may determine the nutrient content of their meals according to a reasonable basis, which allows some flexibility in the actual determination of the food's nutrient content.<sup>82</sup> According to FDA precedent, a reasonable basis has included looking to nutrient databases, cookbooks, laboratory analysis, and other reasonable means.<sup>83</sup> This information would, of course, be of little help to the customer without perspective on how many calories a person should intake per day. Therefore, the Act mandates that this information also be provided as well as a statement on the availability of other nutritional information upon customer request.<sup>84</sup> The Act also provides special rules for restaurants offering buffet meals, self service, variety meals, "build your own" type plates, and combination meals.<sup>85</sup>

The last major concern of section 4205 is federal preemption of the previously discussed state and local menu labeling laws, many of which have more stringent requirements with a broader scope. The Act amends section 403A of the FDCA which governs

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*Explains Rise In Obesity In United States, Study Finds.* SCIENCE DAILY (2009), available at <http://www.sciencedaily.com/releases/2009/05/090508045321.htm> (last visited Mar. 18, 2011).

<sup>79</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 2011*, HEALTH & NUTRITION, 97, 138. (2011), available at <http://www.census.gov/prod/2011pubs/11statab/health.pdf> (last visited Mar. 17, 2011).

<sup>80</sup> Stephanie Saul, *Conflict on the Menu*, N.Y. TIMES, Feb. 16, 2008, <http://www.nytimes.com/2008/02/16/business/16obese.html> (last visited Mar. 17, 2011).

<sup>81</sup> Banker, *supra* note 41, at 921-22.

<sup>82</sup> 21 U.S.C. § 343(q)(5)(H)(iv).

<sup>83</sup> *Id.* § 343(q)(5)(H)(iv).

<sup>84</sup> *Id.* § 343(q)(5)(H)(ii)(III).

<sup>85</sup> *Id.* § 343(q)(5)(H)(v).

2011] *The Informed Consumer is a Healthy Consumer?* 519

federal preemption of state and local food labeling requirements.<sup>86</sup> Section 4205 does not preempt any provisions of state or local law unless otherwise expressly preempted by the FDCA. Thus, the Act does not create an entirely uniform system of menu labeling. State and local governments are no longer able to directly or indirectly impose any nutrition labeling requirements on chain restaurants with twenty or more locations, doing business under the same name, and offering for sale substantially the same menu items that are not identical to the requirements of section 4205.<sup>87</sup> However, state and local laws that are identical to section 4205 are not preempted.<sup>88</sup> In addition, nutrition labeling laws that apply to restaurants that do not meet the size, menu, or name requirements of section 4205 will still be governed by state and local regulation.<sup>89</sup>

### *III. The Pros and Cons of the Menu Labeling Law*

#### *A. The Benefits of Menu Labeling*

One of menu labeling's primary concerns is to stop the underestimation of calories that occurs when consumers eat out.<sup>90</sup> This problem is particularly salient as restaurant patronage has increased steadily over the past few decades and is currently at its highest level.<sup>91</sup> One survey found that restaurant patrons significantly underestimated fat and saturated fat levels of certain meals by half of their actual fat content and underestimated calorie content of all meals by an average of 600 calories.<sup>92</sup> Many critics of menu labeling argue that consumers are already aware of the dangers certain foods pose and can judge for themselves

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<sup>86</sup> Press Release, Food & Drug Admin., Guidance for the Industry: Questions and Answers Regarding The Effect of Section 4205 of the Patient Protection and Affordable Healthcare Act of 2010 on State and Local Menu and Vending Machine Labeling Laws (2010), *available at* <http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm223408.htm> (last visited Apr. 9, 2011).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*; Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 4205(d)(1), 124 Stat. 119, 573-76 (2010).

<sup>90</sup> Scot Burton et al., *Attacking the Obesity Epidemic: The Potential Health Benefits of Proving Nutrition Information in Restaurants*, 96 AM. J. PUB. HEALTH 1669, 1674 (2006).

<sup>91</sup> Press Release, Nat'l Restaurant Assoc., Facts at a Glance (2011) <http://www.restaurant.org/research/facts/> (last visited Mar. 17, 2011).

<sup>92</sup> Banker, *supra* note 41, at 916.

the relative healthiness of various meals. However, although consumers generally do have some background knowledge on which basic foods are healthy, it can be particularly difficult to judge which meals are healthy when the consumer does not know how entire meals are prepared. Menu labeling holds great potential to fix this problem. For example, in a study of consumer behavior at Subway, patrons who reported seeing calorie information before they purchased their meals purchased meals with 52 fewer calories than by those consumers who had not seen the calorie information.<sup>93</sup> These survey results confirm that calorie disclosure may be effective in stopping excess calorie consumption and fighting obesity. Accordingly, mandatory menu labeling will disclose the information necessary to enable consumers to make a low-calorie choice before the point of sale and help decrease the amount of consumers who suffer from being overweight or obese.

In addition, the Act requires that establishments provide additional nutritional information, such as sodium or fat content, to those patrons who request it.<sup>94</sup> In order to be an effective measure against obesity, the federal menu labeling law relies on the consumer to actively participate in making healthier choices for themselves. Consequently, consumers should not feel as if the government is interfering with their daily dietary choices. Instead, the federal menu labeling law provides a means for individuals to make their own informed choices. After the implementation of menu labeling laws, nutritional content of food will become common knowledge, and thus, tort cases concerning the propensity for certain restaurant's foods to cause obesity should decrease. Moreover, restaurants will be relieved from any duty to ensure that individuals do not over-consume. Hence, it could be argued that menu labeling laws strengthen the notion that individuals are responsible for their own over-consumption.

Another interesting benefit stemming from mandatory menu labeling is that mandatory calorie disclosure encourages restaurants to innovate and offer lower calorie meals across the board. When asked about the local menu labeling laws in New York City, New York's health commissioner, Dr. Thomas R. Frieden, noted that "[w]hen places have to put '2,700 calories' next to an appetizer, . . . they might not have a 2,700-calorie

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<sup>93</sup> Bassett, *supra* note 24, at 1457-59 (reportedly purchasing meals with 714 calories versus 766 calories).

<sup>94</sup> Banker, *supra* note 41, at 906.

2011] *The Informed Consumer is a Healthy Consumer?* 521

appetizer anymore.”<sup>95</sup> One major concern for restaurants is that menu labeling will have a negative effect on their revenue because consumers will stop buying their food after seeing how many calories it contains. Therefore, in order to stay competitive, new market forces will incentivize these restaurants to shift to a lower calorie menu, which many chains are already voluntarily doing in anticipation of the law. For example, before New York City implemented their menu labeling laws, McDonald’s large fries contained 570 calories.<sup>96</sup> After the law’s implementation, the fries only contained 500 calories, for a significant 70 calorie reduction.<sup>97</sup> Moreover, two large national chains, Romano’s Macaroni Grill and Denny’s, have announced that they will reduce the calorie content of already existing menu items in addition to providing new, lower calorie options.<sup>98</sup> Another national chain, Panera Bread, began voluntarily disclosing calorie information in all chains in April 2010.<sup>99</sup> Panera’s Chief Concept Officer, Scott Davis, noted that as menu boards featuring the new calorie information were introduced around the country, Panera Bread noticed its customers gravitating towards options that allowed them to customize meals where they could pair smaller portions of soups, salads, and sandwiches to create a meal with flavor but fewer calories.<sup>100</sup> Mr. Davis further stated, “[t]his whole initiative prompted us to take an even closer look at our menu offerings... [a]s a result we improved the nutritional content and ingredients in several of our menu items. We view it as a ‘win-win’ for both our customers and Panera.”<sup>101</sup> Therefore, although some restaurants may see a decrease in customers ordering their typical high calorie meals, restaurants may keep their competitive edge by changing their focus to lower calorie, yet flavorful, options. Thus, as the restaurants reformulate existing menu items to reduce calorie content, all consumers will reap the health benefits, even those not actively seeking to reduce their calorie intake.

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<sup>95</sup> Saul, *supra* note 80.

<sup>96</sup> Ctr. for Science in the Public Interest, *Product Reformation: A Beneficial Outcome of Menu Labeling*, [http://cspinet.org/new/pdf/reformulation\\_fact\\_sheet.pdf](http://cspinet.org/new/pdf/reformulation_fact_sheet.pdf) (last visited Mar. 17, 2011).

<sup>97</sup> *Id.*

<sup>98</sup> Banker, *supra* note 41, at 913-14.

<sup>99</sup> Press Release: Panera Bread, Panera Bread First National Restaurant Concept to Post Calorie Information on All Menu Boards (Mar. 10, 2010), <http://www.panerabread.com/pdf/pr-20100310.pdf> (last visited Mar. 17, 2011).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

## B. The Problems with Menu Labeling

Although the federal menu labeling law addresses consumer calorie content miscalculations that occur when consumers eat outside their home, there are still many problems concerning the nation's health that the law does not fully address. First, menu labeling is not universally popular. Many restaurant and pro-business advocates are concerned that the burden of the law falls unfairly on restaurants because restaurants are now required to pay for the cost of determining the calorie content of each meal, in addition to adding this information to the menu each time it offers a new dish.<sup>102</sup> Others argue that the law is anti-competitive in that it shifts revenue away from those restaurants that have always disclosed calorie or nutrition information and served more nutritious, low calorie foods.<sup>103</sup> Moreover, the current federal menu labeling law exempts more than 75% of restaurants nationwide, which means that more than 945,000 foodservice operations in the United States would be exempt from providing calorie and nutrition information to customers.<sup>104</sup> Many in the restaurant industry, including Texas Roadhouse, Popeye's Louisiana Kitchen, Domino's Pizza, Del Taco, Jack in the Box, and Yum! Brands do not support the bill in its current form. They argue that it unfairly exempts smaller chains from its scope and that including all restaurants within the scope of the menu labeling provisions would help the larger chains remain competitive with the smaller, exempted restaurants.<sup>105</sup> Further, these advocates argue that the federal menu labeling law should preempt all state and local menu labeling rules. Without preemption, certain restaurant chains that operate in a multitude

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<sup>102</sup> Stu Woo, *Push for Calories on Menus Gains*, WALL ST. J., at A2, June 11, 2008, available at <http://online.wsj.com/article/SB121313686579962255.html> (last visited Mar. 17, 2011); Press Release, Nat'l Assoc. of Convenience Stores Online, Washington Report: NACS Comments on Menu Labeling Regulations, (Sept. 10, 2010), <http://www.nacsonline.com/NACS/News/Daily/Pages/ND0910101.aspx> (last visited Mar. 17, 2011).

<sup>103</sup> Banker, *supra* note 41, at 920.

<sup>104</sup> Paul Franklin, *Industry Divided on Federal Menu labeling Bill*, NATION'S RESTAURANT NEWS, July 20, 2009, available at <http://www.nrn.com/article/industry-divided-federal-menu-labeling-bill> (last visited Mar. 17, 2011).

<sup>105</sup> *Id.* The National Restaurant Association originally supported a federal menu labeling law because a national uniform standard would be easier for large chain restaurants and restaurants that operate in different jurisdictions to follow than the emerging patchwork of state and local rules.

2011] *The Informed Consumer is a Healthy Consumer?* 523

of jurisdictions are still subjected to a patchwork of local laws with different standards for compliance.<sup>106</sup> As Travis Doster, a spokesman for Texas Roadhouse, noted: “You don’t require just the biggest cars to have seatbelts; you require all cars.”<sup>107</sup>

Similarly, some are concerned that there are downsides to the federal menu labeling law that may affect its overall effectiveness. First, the law places too much confidence in the consumer to choose healthy foods when eating out. Thus, if consumers do not change behavior based on the new calorie information, the effectiveness of menu labeling in reducing obesity may be limited. The law assumes that the consumer will change his or her eating habits based on the disclosed information and select a meal containing lower calories. Unfortunately, studies instead seem to point to the obvious conclusion that consumers focus on flavor and taste when they go out to eat.<sup>108</sup> In other words, nutrition is just one concern among many when consumers choose to dine out.<sup>109</sup>

Although nutrition information may influence choices and attitudes, other factors may be more salient, such as whether or not the respondent is on a diet, the price of food, or the taste (and perceived taste) of the meal.<sup>110</sup> For example, consumers decide to eat fast food mostly because it is convenient; when choosing to eat at a sit-down restaurant, they weigh nutrition among other factors including taste, variety, entertainment, ambiance, and convenience.<sup>111</sup> Because nutrition is not at the forefront of many consumers’ minds when they go out to eat, patrons may not change their minds on which meal to order merely because the calorie information is provided on their menus. A number of studies on restaurants that already disclose calorie information have shown mixed results regarding the overall effectiveness of menu labeling.<sup>112</sup> Therefore, if the federal menu labeling law is

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Sarah Graham, *Study Shows Fatty Foods Really Do Taste Good*, SCIENTIFIC AMERICAN, Dec. 5, 2001, available at <http://www.scientificamerican.com/article.cfm?id=study-shows-fatty-foods-r> (last visited Mar. 17, 2011).

<sup>109</sup> Hayden Stewart et al., *Let’s Eat Out: Americans Weigh Taste, Convenience, and Nutrition*, U.S. DEP’T OF AGRIC. (2006), available at <http://www.ers.usda.gov/publications/eib19/eib19.pdf> (Mar. 17, 2011).

<sup>110</sup> *Report of Working Group on Obesity*, *supra* note 45.

<sup>111</sup> Stewart et al., *supra* note 109.

<sup>112</sup> *Report of Working Group on Obesity*, *supra* note 45; see also Elbel, *supra* note 3, at 1110; Roberto et al., *supra* note 3, at 312. *But see* Press Release,

ineffective at changing people's minds regarding their diet, some consumer advocates argue that American's right to eat guilt-free should be protected, and that restaurants should not be forced to bear any burden in the name of menu labeling.<sup>113</sup> However, proponents of menu labeling have concluded that despite these concerns and the "gaps in the scientific knowledge" regarding menu labeling, sufficient rationale exists for supporting the implementation of the nationwide scheme.<sup>114</sup> Even so, if the only people who change their eating habits based on the information gleaned from the menu-labels are those who were previously duped into buying faux-healthy meals such as the BK Tendercrisp sandwich (discussed previously), then menu labeling may turn out to be an unsubstantial force in reducing the amount of consumers who suffer from being overweight or obese.

Another potential danger in implementing calorie-centric menu labeling in restaurants is the creation of a "low calorie halo effect" for consumers. The FDA has stated that a halo effect occurs "when a consumer reacts to a particular positive claim about a product and assumes that the entire product has positive attributes."<sup>115</sup> For example, a food product labeled "low-fat" may signal to some consumers that the product is also healthy and must be low calorie too.<sup>116</sup> This, however, is not always the case. The potential for a halo effect arising from health claims on packaged foods is mitigated by the NLEA's rules which require that food products for retail sale must be labeled with a complete list of nutrition information. However, despite the NLEA's clear and concise labeling scheme, many consumers still do not understand everything disclosed on the Nutrition Facts panel.<sup>117</sup>

The federal menu labeling requirements are quite different from those of the NLEA. Under the federal menu labeling law, calories are the only piece of nutritional information that must be

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State and Local Menu Labeling Policies (2010), [http://cspinet.org/new/pdf/ml\\_map.pdf](http://cspinet.org/new/pdf/ml_map.pdf) (last visited Mar. 17, 2011). Even by February 2010, the only areas that had even implemented menu labeling laws were in New York City, New York, Westchester County, New York, Philadelphia, Pennsylvania, and King County, Washington; thus there has not been much opportunity to study the impact of menu labeling laws on a grand scale.

<sup>113</sup> See generally, Ctr. for Consumer Freedom, *Food Police, Ten Dumbest Food Cop Ideas*, Sept. 27, 2004, <http://www.consumerfreedom.com/issuepage.cfm/topic/26> (last visited Mar. 17, 2011).

<sup>114</sup> Banker, *supra* note 41, at 921.

<sup>115</sup> *Report of the Working Group on Obesity*, *supra* note 45.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

2011] *The Informed Consumer is a Healthy Consumer?* 525

disclosed on the menu for each food item, and in order to obtain the full list of ingredients and nutrition facts for each selection, the customer must request a copy of this information. As calories are the highlighted piece of information, this may create a calorie halo effect.<sup>118</sup> Although it would be impracticable to provide consumers with each menu item's nutrition facts at the point of sale, consumers who simply focus on calories and cutting them out of their diet may succeed in losing weight, but may also ignore other important nutritional concerns. For example, high sodium diets are linked to an increase in blood pressure and a higher risk for heart disease and stroke. The problem is that sodium does not contain calories. Therefore, as restaurants are attempting to make their meals more appealing by lowering the amount of calories, these restaurants may add salt or other substances to the dishes to add flavor, inadvertently compromising healthiness for taste.

Moreover, there is another risk that restaurants may increase their use of artificial sweeteners to preserve taste as calories are reduced. These artificial food additives can be attractive because they add virtually no calories to a diet, many can be used for baking and cooking, and compared to regular sugar, only a fraction is required for comparative sweetness.<sup>119</sup> Today, many of these artificial sweeteners can be found in products marketed as "sugar-free," or "diet," including soft drinks, chewing gum, jellies, baked goods, fruit juice, and ice cream.<sup>120</sup> In anticipation of the new menu labeling law, many restaurants have been modifying menus in order to provide lower calorie selections by reducing the amount of high calorie ingredients in the dish. Because consumers desire flavorful food when they eat out, restaurants may turn to lower calorie substitutes for high calorie ingredients, such as artificial sweeteners and other additives. Although the FDA, which regulates these food additives including the above-mentioned

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<sup>118</sup> See Jon Vredenburg, *The Health Halo Effect*, HEALTH SOURCE MAGAZINE, Aug. 16, 2010, available at <http://healthsourcemag.com/blog/jon-vredenburg/healthy-eating-habits/the-health-halo-effect/> (last visited Mar. 17, 2011) (discussing the paradox that Americans are seemingly paying more attention to healthier eating yet continually getting fatter and explaining the health halo effect with "healthy restaurants.").

<sup>119</sup> Mayo Clinic Staff, *Artificial Sweeteners: Understanding These and Other Sugar Substitutes*, THE MAYO CLINIC, Oct. 9, 2010, available at <http://www.mayoclinic.com/health/artificial-sweeteners/MY00073> (last visited Mar. 17, 2011).

<sup>120</sup> *Id.*

artificial sweeteners and sugar alcohols, has labeled many of these products as ‘generally recognized as safe’ (or “GRAS”), controversy still surrounds these products. The National Cancer Institute, an agency of the Department of Health and Human Services, states that although some artificial sweeteners were shown to cause bladder cancer, lymphomas, and leukemia in laboratory animals, the results from other studies have not provided *clear* evidence of an association with cancer in humans.<sup>121</sup>

Furthermore, one artificial sweetener, saccharin, has remained listed since 1981 as a “substance reasonably anticipated to be a human carcinogen”.<sup>122</sup> Lara Dunbar, senior vice president of government affairs for the California Restaurant Association, has argued that calorie information is not a good measure for the overall healthfulness of food and drinks based on the many other aspects to a healthy diet of which individuals should be aware.<sup>123</sup> “Diet Pepsi has no calories,” she stated. “Low-fat milk has 130 calories. What’s healthier?”<sup>124</sup> Although many of these artificial sweeteners and additives are currently considered safe for human consumption, much controversy still surrounds these products and research on their safety continues.

Some menu labeling critics are also concerned that adding each menu item’s calorie content to the menu may have unintended harmful consequences that could magnify America’s already disordered approach to eating. Obesity may be unhealthy, yet so is the other extreme alternative: a calorie obsessed culture that is conducive to disorders like anorexia and bulimia. Paradoxically, America has both the highest per capita obesity rates and the highest anorexia rates in the world.<sup>125</sup> During the past decade, health officials have placed increasing emphasis on obesity rates, and during this time period, the incidence of eating disorders has nearly tripled.<sup>126</sup> Even Hillary

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<sup>121</sup> Press Release, Nat’l Cancer Inst., Artificial Sweeteners and Cancer (Aug. 5, 2009), *available at* <http://www.cancer.gov/cancertopics/factsheet/Risk/artificial-sweeteners> (last visited Mar. 17, 2011).

<sup>122</sup> *Id.*

<sup>123</sup> Woo, *supra* note 102.

<sup>124</sup> *Id.*

<sup>125</sup> Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1720 (2004).

<sup>126</sup> Press Release, Ctr. For Consumer Freedom, CCF Tells Marylanders the Truth About Menu Labeling Laws, Oct. 23, 2007, [http://www.consumerfreedom.com/news\\_detail.cfm/h/3475-ccf-tells-marylanders-the-truth-about-menu-labeling-laws](http://www.consumerfreedom.com/news_detail.cfm/h/3475-ccf-tells-marylanders-the-truth-about-menu-labeling-laws) (last visited Mar. 17, 2011).

2011] *The Informed Consumer is a Healthy Consumer?* 527

Clinton, while serving as a New York Senator noted, “[m]any adolescents misinterpret [the fight against obesity] as a message that they should eat to achieve the body of a runway model. Anorexia and bulimia are increasingly common among our nation’s youth.”<sup>127</sup> Thus, menu labeling that is calorie-centric may lead some individuals to become too obsessed with losing weight, counting calories, and succumb to cultural pressures to be thin. As Johanna Kandel, of the Alliance for Eating Disorder Awareness said, “[t]here’s been so much emphasis on childhood obesity, all these programs to ameliorate the situation and in a way we’re actually potentiating eating disorders. That’s a very thin line we need to walk and make sure the dialogue is one of a healthy attitude towards food.”<sup>128</sup> A healthy attitude towards food focuses on an individual’s overall nutrition. The danger, however, is that by simply labeling menu items with calorie information, some consumers may hyper-focus on this one aspect of their overall health.

#### *IV. Recent Supplementary and Alternative Proposals Designed to Fight Obesity*

After considering the potential downsides and inadequacies of using the federal menu labeling law to address the problem of obesity, the question becomes: what alternatives to menu labeling exist and would they be more effective weapons in the fight against obesity?

The “soda tax” is one such potential alternative to menu labeling that has both gained and then lost support in recent years. Currently, according to the Center on Budget and Policy Priorities, thirty-nine states, including Indiana, Illinois, and Ohio, impose special excise taxes on soda and other beverages, such as sports and energy drinks that contain added sugar.<sup>129</sup> In fact, Washington State has recently expanded its soda sales tax to include both sugary drinks and candy.<sup>130</sup> These taxes are based on

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<sup>127</sup> *Id.*

<sup>128</sup> Courtney Hutchison, *Eating Disorders Strike Younger and Younger*, ALLIANCE FOR EATING DISORDERS AWARENESS, Dec. 6, 2010, <http://www.allianceforeatingdisorders.com/index.cfm?fuseaction=news.details&ArticleId=11> (last visited Mar. 17, 2011).

<sup>129</sup> Emily Zoladz, *Soda Pop Drinkers Dread Idea of Michigan Sales Tax on Their Favorite Beverage*, GRAND RAPIDS PRESS, Aug. 6, 2009, available at [http://www.mlive.com/news/grandrapids/index.ssf/2009/08/soda\\_pop\\_drinkers\\_dread\\_idea\\_o.html](http://www.mlive.com/news/grandrapids/index.ssf/2009/08/soda_pop_drinkers_dread_idea_o.html) (last visited Mar. 17, 2011).

<sup>130</sup> Joseph Henchman & Xander Stephenson, *Fiscal Facts: A Review of*

studies showing that soft drinks are nutritionally worthless and more conducive to weight gain than solid food. Recently, a statewide study in California confirmed that soda and other sugar-sweetened beverages are one of the largest, if not the largest, contributor to obesity.<sup>131</sup> Moreover, because soda is incredibly cheap, it has become very popular.<sup>132</sup> As a result, these sugary drinks are a factor in causing expensive and debilitating diseases that result in massive expenses for the government. In 2006, soda, energy drinks, and sports drinks were ranked fourth in a list of the most prevalent sources of calories among Americans over the age of two, above both pizza and alcoholic beverages.<sup>133</sup> Therefore, advocates for the “soda tax” argue that a new federal tax on these products could be used as a method of combating obesity. Moreover, a national excise tax on these ‘nutritionally worthless’ sugary drinks could raise more than \$24 billion over the next four years.<sup>134</sup> These \$24 billion could then be used to fund healthcare for many Americans or fund programs designed to promote a healthy lifestyle.<sup>135</sup> Additionally, by implementing a soda tax, the cost of the tax will be passed through to the consumer and these higher prices will act as a direct deterrent to buying sugary drinks that have little or no nutritional value.

Some argue that the sugary drinks industry is the new cigarette industry, with heavy marketing to children, intense lobbying to prevent taxation and change, and claims that its

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2010's *Changes in State Tax Policy*, TAX FOUND., Aug. 23, 2010, available at <http://www.taxfoundation.org/research/show/26645.html> (last visited Mar. 17, 2011).

<sup>131</sup> Press Release, Ctr. for Science in the Pub. Int., Taxing Soda Could Trim State Deficits (and Waistlines), Says Report, (Sept. 30, 2009), <http://www.cspinet.org/new/200909301.html> (last visited Mar. 17 2011) [hereinafter *Taxing Soda*].

<sup>132</sup> *Id.*

<sup>133</sup> Press Release, USDA, Dietary Guidelines for Americans, Jan. 31, 2011 available at <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/Chapter2.pdf> (last visited: Mar. 17, 2011).

<sup>134</sup> Brian Montopoli, *Senate Considers Federal Tax on Soda*, CBS NEWS, May 12, 2009, [http://www.cbsnews.com/8301-503544\\_162-5009316-503544.html](http://www.cbsnews.com/8301-503544_162-5009316-503544.html) (last visited Mar. 21, 2011); see also *Taxing Soda*, *supra* note 131 (the Senate Finance Committee considered a soda tax along with a higher tax on alcohol when it released a policy options paper on health care reform but these taxes were not included in the draft legislation nor have they been offered in an amendment).

<sup>135</sup> Montopoli, *supra* note 134.

2011] *The Informed Consumer is a Healthy Consumer?* 529

products are part of a healthy diet or at worst benign.<sup>136</sup> These advocates in favor of the soda tax argue that in light of these worrisome similarities, a soda tax is completely reasonable.<sup>137</sup> Even President Obama has expressed interest in levying a national soda tax stating, “I actually think [a soda tax is] an idea that we should be exploring. There’s no doubt that our kids drink way too much soda.” In fact, in 2010, President Obama announced a plan to ban candy and sweetened beverages in schools.<sup>138</sup>

However, not all members of the American public are so enthusiastic about the idea. Many see the law not as another “sin tax” like those imposed on other harmful and unnecessary substances like alcohol or cigarettes, but as a tax on everyday grocery items that consumers depend on as being low priced to feed their families. Hence, one common criticism is that many of those individuals hardest hit by a soda tax would be citizens of lower socio-economic status. In fact, a tax of one penny per ounce of drink would raise the price of a twelve-pack of Coca-cola on sale from \$2.99 to \$4.43.<sup>139</sup> Moreover, paternalistic laws that clearly judge certain consumer behavior are always met with strong opposition.

Naturally, soda industry advocates also oppose the levying of state and federal taxes on soda and have reminded voters that drink manufacturers employ many citizens.<sup>140</sup> These advocates argue that in an already difficult economy, workers and businesses do not need another incentive for people to not buy their products, and thus, it is not the right time to even discuss levying a soda tax.<sup>141</sup> Additionally, the President of the American Beverage Association has argued that sugary soft drinks are not the sole cause of obesity and noted that “[i]f you’re trying to manage people being overweight you need a variety of behavior changes to achieve energy balance – it can’t be done by eliminating one food from the diet.”<sup>142</sup> Although there has been much more talk of taxing substances like soda and candy, clearly

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<sup>136</sup> Mark Bittman, *Soda: A Sin We Sip Instead Of Smoke?*, N.Y. TIMES Feb. 13, 2010, available at [http://www.nytimes.com/2010/02/14/weekinreview/14bittman.html?\\_r=1](http://www.nytimes.com/2010/02/14/weekinreview/14bittman.html?_r=1) (last visited Mar. 21, 2011).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Zoladz, *supra* note 129.

<sup>141</sup> *Id.*

<sup>142</sup> Bittman, *supra* note 136.

there are many obstacles and strong opposition to these measures even at the state level; as in 2009, at least twelve other states proposed soda taxes and none were approved.<sup>143</sup>

Some argue that even more extreme measures, including either levying an “obesity tax” or imposing insurance penalties on obese individuals, are effective ways at both fighting obesity and raising revenue to prevent the government from being overwhelmed by healthcare costs in light of the new Healthcare Act. Approximately \$147 billion in healthcare costs were attributable to individuals who were overweight and obese in 2008.<sup>144</sup> The new healthcare reform bill expands Medicaid coverage to include individuals with income at or below 133% of the federal poverty line and childless adults by 2014.<sup>145</sup> Accordingly, a large percentage of obese individuals will benefit as there is significant nexus between poverty and obesity.<sup>146</sup>

Under this bill, the federal government will pay 100% of the costs for covering newly eligible individuals through 2016. Despite the huge costs of this bill, the Congressional Budget Office says that the bill will cut the deficit over the first ten years, and thus, it will raise more money than it will spend.<sup>147</sup> For example, one of the measures designed to bring in revenue to pay for the healthcare bill’s extraordinary cost is a new Medicare tax increase on individuals making over \$200,000 per year and married couples making over \$250,000 per year, as well as an entirely new tax of 3.8% on unearned income for those same individuals.<sup>148</sup> With these measures alone, not to mention other revenue raising schemes, the Joint Committee on Taxation estimates that \$210 billion in revenue will be raised. Therefore, even when considering just these few changes, it is obvious that

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<sup>143</sup> *Id.*

<sup>144</sup> Finkelstein et al., *supra* note 16, at 22.

<sup>145</sup> Patient Protection and Affordable Care Act, Pub. L. 111-148, §2001(a), 124 Stat. 119, (2010).

<sup>146</sup> Sayward Byrd, *Civil Rights and the “Twinkie Tax”*: *The 900-Pound Gorilla in the War on Obesity*, 65 LA. L. REV. 303, 324 (2004).

<sup>147</sup> Ezra Klein, *CBO: Health-care Reform Bill Cuts Deficit by \$1.3 Trillion over 20 Years, Covers 95%*. THE WASH. POST, Mar. 18, 2010, available at [http://voices.washingtonpost.com/ezra-klein/2010/03/cbo\\_health-care\\_reform\\_bill\\_cu.html](http://voices.washingtonpost.com/ezra-klein/2010/03/cbo_health-care_reform_bill_cu.html) (last visited Mar. 21, 2011).

<sup>148</sup> Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1402(a)(4) (2010); see generally Jeanne Sahadi, *Medicare Tax Hikes: What the Rich Will Pay*, CNNMONEY.COM, Mar. 25, 2010, available at [http://money.cnn.com/2010/03/22/news/economy/medicare\\_tax\\_increase/index.htm](http://money.cnn.com/2010/03/22/news/economy/medicare_tax_increase/index.htm) (last visited Mar. 21, 2011).

2011] *The Informed Consumer is a Healthy Consumer?* 531

the government, or namely American taxpayers, will be undertaking a large financial burden.

As many of the costs from an unhealthy America will be spread to the taxpayers if not borne by those unhealthy individuals, there is an obvious argument that those individuals considered obese should, through alternative schemes, be the ones who should bear this cost.<sup>149</sup> Thus, imposing economic disincentives on individuals suffering from obesity incentivizes healthier behavior, calorie reduction, and increased exercise. First, an “obesity tax” would presumably make desirable snacks with a certain percentage of fat or an excessive number of calories undesirable by increasing their cost to the consumer, and may be an effective, albeit severe, method of combating obesity and lowering healthcare costs.<sup>150</sup> To deal with the increasing cost of healthcare due to obesity, New York’s Governor proposed an obesity tax in 2008 which would charge higher sales taxes on the food items that appeal to “fat people” or cause weight problems.<sup>151</sup> Second, insurance penalties or higher premiums for obese individuals would place the burden of the healthcare costs caused by obesity on those individuals who are actually obese, and also provide incentives for them to lose weight. In fact, the current healthcare bill allows insurers to increase financial incentives based on weight and introduce incentives for “healthy lifestyles” into Medicare and Medicaid.<sup>152</sup> Advocates of these particular measures argue that Americans’ genes have not changed over the past thirty years during the rise of obesity but instead, that obesity is a product of the modern food environment.<sup>153</sup> Thus, people must learn to cope with the new food environment or “pay the price.”<sup>154</sup> Because the government is now more active in the

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<sup>149</sup> See generally Byrd, *supra* note 146, at 325.

<sup>150</sup> David Leonhart, *Fat Tax*, N.Y. TIMES, Aug. 12, 2009, available at [http://www.nytimes.com/2009/08/16/magazine/16FOB-wwln-t.html?\\_r=1](http://www.nytimes.com/2009/08/16/magazine/16FOB-wwln-t.html?_r=1) (last visited Mar. 21, 2011).

<sup>151</sup> See Lenn Blain & Kenneth Lovett, *Governor Paterson Proposes “Obesity Tax,” a Tax on Non-Diet Sodas*, DAILY ALBANY BUREAU, Dec. 14, 2008, available at [http://www.nydailynews.com/ny\\_local/2008/12/14/2008-12-14\\_governor\\_paterson\\_proposes\\_obesity\\_tax\\_a-1.html](http://www.nydailynews.com/ny_local/2008/12/14/2008-12-14_governor_paterson_proposes_obesity_tax_a-1.html) (last visited Mar. 21, 2011).

<sup>152</sup> David S. Hilzenrath, *Wellness Incentives Could Create Health-Care Loophole*, THE WASH. POST, Oct. 16, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/15/AR2009101503036.html> (last visited Mar. 21, 2011).

<sup>153</sup> Leonhart, *supra* note 150.

<sup>154</sup> *Id.*

healthcare industry, this new strict approach to regulation concerning the population's actual health should not come as a surprise.<sup>155</sup> However, measures like these are obviously met with opposition from many groups that do not support the idea of using health insurance to incentivize certain healthy behaviors as they argue that insurance is a safety net that recognizes health and youth are fleeting.<sup>156</sup> Moreover, measures specifically targeting obese individuals and particular diseases that accompany obesity may contribute to the increased instances of obesity discrimination.<sup>157</sup> In fact, a study from the Rudd Center for Food Policy and Obesity at Yale University found that weight discrimination is on the rise.<sup>158</sup> Discrimination refers to the negative, unequal treatment of people because of their membership in a particular group, such as those who are classified as obese or overweight.<sup>159</sup> The study demonstrated that from 1995-2005, discrimination based on weight increased by 66%.<sup>160</sup> Therefore, making laws that specifically target obese and overweight individuals could promote the social acceptability of negative attitudes towards this particular group.<sup>161</sup> These measures may especially reinforce the negative stereotype that obese individuals lack will power when it comes to food.<sup>162</sup>

Another important obstacle in the fight against obesity is

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<sup>155</sup> See generally Shirley S. Wang, *Another Thing Big in Japan: Measuring Waistlines*, WALL ST. J., June 13, 2008, available at <http://blogs.wsj.com/health/2008/06/13/another-thing-big-in-japan-measuring-waistlines> (last visited Mar. 21, 2011). Although higher taxes for obese individuals or insurance prices may seem harsh to some or an "argument for argument's sake" theory on reducing obesity, such invasive and strict measures have come to pass in other countries. For example, in Japan, a new law requires individuals between the ages of forty and seventy-four with a weight related medical concern and whose waist is larger than the acceptable size (33.5 inches for men and 35.4 inches for women) to lose weight or face compulsory diet advice as well as doctor's visits for three to six months.

<sup>156</sup> Hilzenrath, *supra* note 152.

<sup>157</sup> *Id.*

<sup>158</sup> R.M. Puhl et al., *Perceptions of Weight Discrimination: Prevalence and Comparison to Race and Gender Discrimination in America*, INT'L J. OF OBESITY 32, 992-1000 (2008) available at <http://yaleruddcenter.org/resources/upload/docs/news/IJO2008.pdf>.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Rebecca Puhl, *Weight Discrimination: A Socially Acceptable Injustice*, OBESITY ACTION COALITION, <http://www.obesityaction.org/magazine/oacnews12/Obesity%20Discrimination.pdf>.

<sup>162</sup> *Id.*

2011] *The Informed Consumer is a Healthy Consumer?* 533

the lack of access to nutritional food and the particular risk obesity poses to lower socioeconomic populations. According to the U.S. Department of Agriculture, in 2008, 17,149,000 households were considered “food insecure,” meaning they had limited or uncertain ability to acquire acceptable foods.<sup>163</sup> This number reflected an increase from 13,011,000 households in 2007.<sup>164</sup> In the Department’s study, “food insecurity” was measured by focusing on the experience of those with constrained resources who often must juggle necessities, decrease the quality and variety of the household member’s diets, and eventually may be forced to decrease food intake.<sup>165</sup> Also contributing to this problem, restaurants have continued to increase portion sizes as well as price incentives for purchasing larger portions.<sup>166</sup> Fast food companies’ profit margins rise from providing more food for lower prices, which in turn leads to excessive calorie consumption.<sup>167</sup> This practice is successful at enticing consumers with limited means. Moreover, these socioeconomically disadvantaged consumers often live in neighborhoods plagued by a lack of access to full service supermarkets, fresh fruits, and vegetables.<sup>168</sup>

Most underserved communities often do not have the five or more acres of contiguous parcels of land necessary to even accommodate the spatial needs of a full service supermarket.<sup>169</sup> Studies have shown that in these communities where many racial minorities live, the nearest supermarkets were often a mile

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<sup>163</sup> U.S. DEP’T OF AGRIC., ECONOMIC RESEARCH SERVICE, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES, 2008, ECONOMIC RESEARCH REPORT NUMBER 83, *available at* <http://www.ers.usda.gov/Publications/ERR83/ERR83.pdf> (last visited Mar. 21, 2011).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See Jodi Schuette Green, *Cheeseburger in Paradise? An Analysis of How New York’s State Restaurant Association v. New York City Board of Health May Reform Our Fast Food Nation*, 59 DEPAUL L. REV. 733, 738 (2010).

<sup>167</sup> Schulman, *supra* note 18, at 595.

<sup>168</sup> Sheila Fleischhacker, *Carrots or Candy in Corner Stores?: Federal Facilitators and Barriers to Stocking Healthier Options*, 7 IND. HEALTH L. REV. 23, 26 (2010); see Press Release, TheFoodTrust.org, Healthy Corner Store Initiative (2004), <http://www.thefoodtrust.org/php/programs/corner.store.campaign.php> (last visited Mar. 11, 2011). [hereinafter *Healthy Corner Store*].

<sup>169</sup> The Food Trust, *Greening Grocery: Strategies for Sustainable Food Retailing*, Spring 2008, at 1, [http://www.thefoodtrust.org/catalog/download.php?product\\_id=150](http://www.thefoodtrust.org/catalog/download.php?product_id=150) (last visited Mar. 21, 2011).

further away than in Caucasian neighborhoods.<sup>170</sup> Consumers living in neighborhoods with low availability to healthy foods and supermarkets often report looking to other local options for food such as fast food restaurants and corner convenience stores, thereby consuming lower quality diets.<sup>171</sup> Accordingly, these economically disadvantaged individuals are among the least likely to change their eating behaviors in response to new menu labeling laws.<sup>172</sup> Although menu labeling may increase consumer awareness about the relative nutritional value of menu items, it does little to help increase access to healthy foods. Therefore, governmental programs must be narrowly tailored to help and subsidize smaller local neighborhood groceries, corner stores, and even restaurants already in the area or moving to the area to stock and feature fresher, healthier fruits and vegetables. Studies have shown that African Americans' fruit and vegetable intake increased by 32% for each additional supermarket in the census tract, while Caucasians' fruit and vegetable intake increased by 11% with the presence of one or more supermarkets.<sup>173</sup> Accordingly, the current administration has undertaken drastic efforts to promote greater access to healthy foods in low-income neighborhoods with the \$400 million Healthy Food Financing Initiative.<sup>174</sup> The dual goals of the current initiative are to both support grocery stores that supply healthy foods and create jobs.<sup>175</sup>

Another model that could be expanded to help improve access to healthy foods on a more national scale is known as the healthy store initiative. In 2009, the Johns Hopkins Center for American Indian Health, along with various tribal nations, embarked on an initiative to promote cooking with fresh, healthy

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<sup>170</sup> Fleischhacker, *supra* note 168, at 28.

<sup>171</sup> *Id.* at 26; *see also* *Healthy Corner Store*, *supra* note 168.

<sup>172</sup> Schulman, *supra* note 18, at 601.

<sup>173</sup> Fleischhacker, *supra* note 168, at 25.

<sup>174</sup> Other programs designed to combat obesity include the First Lady's "Let's Move" Campaign which focuses on using exercise to help create a healthier population, as well as a Presidential Task Force on Childhood Obesity. *See generally* First Lady Michelle Obama, *Let's Move: America's Move to Raise a Healthier Generation of Kids*, <http://www.letsmove.gov> (last visited Mar. 21, 2011); The White House, Office of the Press Secretary, *Presidential Memorandum-Establishing a Task Force on Childhood Obesity*, <http://www.whitehouse.gov/the-press-office/presidential-memorandum-establishing-a-task-force-childhood-obesity> (last visited Mar. 21, 2011).

<sup>175</sup> Fleischhacker, *supra* note 168, at 46.

2011] *The Informed Consumer is a Healthy Consumer?* 535

foods and to educate on nutrition.<sup>176</sup> The initiative used funds to provide educational programs on healthy eating, shopping, and even teaching tribes to grow traditional crops.<sup>177</sup> Because urban neighborhoods, as is the case with the tribal lands, cannot accommodate or support full-service supermarkets, they instead feature corners stores, fast food restaurants, and small grocers where individuals' access to healthy foods is often limited. Thus, this concept could be used to develop similar programs to educate consumers on how to shop healthy in existing supermarkets and restaurants in low income neighborhoods. Overall, these educational programs could be combined with other financial incentives for grocers and restaurants that provide healthy foods to low income neighborhoods to create change

Reforming America's farm subsidies programs also holds potential to help increase affordability and accessibility of healthy foods. America's agricultural industry is heavily subsidized.<sup>178</sup> For more than a century, the government has supported the majority of the country's agricultural industry with subsidies that have incentivized overproduction of certain commodities. This overproduction has created an artificially low price for items such as grain, oilseeds, corn used to produce high fructose corn syrup, sugar, meat, and dairy products.<sup>179</sup> In contrast, the prices for lower calorie commodities such as certain fruits and vegetables have continued to increase over time in the absence of similar subsidies for their production.<sup>180</sup> The current subsidy structure has led to the overproduction of sources of saturated fat and

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<sup>176</sup> Kathy Pinto, *Initiative Helps Improve Native American Nutrition Through Food Education*, THE NEW MEXICAN, Oct. 5, 2010, <http://www.santafenewmexican.com/Food/Program-ups-Native-nutrition> (last visited Mar. 21, 2011).

<sup>177</sup> *Id.*

<sup>178</sup> Keith E. Sealing, *Attack of the Balloon People: How America's Food Culture and Agricultural Policies Threaten the Food Security of the Poor, Farmers, and Indigenous Peoples of the World*, 40 VAND. J. OF TRANSNAT'L L. 1015, 1027-28, (2007). "There are multiple examples of how American agriculture is so heavily subsidized: Colorado is thought of as one of the great agricultural states, but somewhere in the neighborhood of three quarters of Colorado's farms would lose money if not for federal subsidies; Montana would have zero net farm income without subsidies; half of North Dakota's federal income tax dollars come back to the state in the form of farm subsidies, which go to only 9.5% of the state's population." *Id.*

<sup>179</sup> Patricia L. Farnese, *Remembering the Farmer in the Agriculture Policy and Obesity Debate*, 65 FOOD & DRUG L.J. 391, 392 (2010).

<sup>180</sup> *Id.*

simple carbohydrates.<sup>181</sup> For example, the 2008 Farm Bill, which sets out the subsidies for the farming business, primarily targets grains, oilseeds, sugar beets, barley and various types of rice, among other things. It does not include fruits and vegetables among the other main subsidies.<sup>182</sup> Therefore, by reforming the Farm Bill to add subsidies for those producers of nutritious, lower calorie food products, healthy foods may become more affordable and restaurants may be incentivized to use these healthy ingredients in their dishes. This strategy has been discussed as an alternative to more extreme measures, such as imposing a soda tax, obesity tax, or decreasing the amount of subsidies provided to farmers who produce corn used to manufacture high fructose corn syrup.<sup>183</sup> Thus, if subsidies are given to producers of specific healthy fruits and vegetables that were not as heavily subsidized as other less nutritious, higher calorie food products, healthier foods may become more desirable and affordable.<sup>184</sup>

Finally, another method of combating obesity would utilize city zoning laws to restrict or prohibit fast food and chain restaurants from opening chains stores in certain geographic areas.<sup>185</sup> Several courts have already upheld zoning laws that restrict fast food restaurants and applications of these zoning laws.<sup>186</sup> Instead of banning fast food restaurants throughout an

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<sup>181</sup> Sealing, *supra* note 178, at 1015-37; Farnese, *supra* note 179, at 391.

<sup>182</sup> The Food Conservation and Energy Act of 2008, Pub. L. 110-246. § 1001, 122 Stat. 1651 (2008).

<sup>183</sup> Scott Fields, *Spheres of Influence The Fat of the Land: Do Agricultural Subsidies Foster Poor Health?*, ENVTL. HEALTH PERSP., vol. 112, No. 14 at A821, (Oct. 2004), available at <http://ehp.niehs.nih.gov/members/2004/112-14/EHP112pa820PDF.pdf> (last visited Mar. 21, 2011).

<sup>184</sup> Farnese, *supra* note 179, at 391. The link between agriculture policy and obesity is not universally accepted. Some observers have contested the link between agricultural policy and obesity by analyzing the influence of current commodity policy, particularly agricultural subsidies, on the retail price of food.

<sup>185</sup> Benjamin Montgomery, *The American Obesity Epidemic: Why the U.S. Government Must Attack the Critical Problems of Overweight & Obesity Through Legislation*, 4 J. OF HEALTH & BIOMEDICAL L., 375, 388 (2008).

<sup>186</sup> *Id.* at 388-89; *Franchise Developers, Inc. v. City of Cincinnati*, 505 N.E.2d 966, 971 (Ohio 1987) (denying a permit to develop a Wendy's franchise restaurant based on an ordinance attempting to preserve and protect the character of certain neighborhoods); *McDonald's Corp. v. Bd. of Trustees, Village of Elmsford*, 610 N.Y.S.2d 387 (N.Y.A.D. 3d Dept. 1994) (board's decision to deny McDonald's Corp. a special permit to develop a drive-in restaurant within the village where the restaurant wanted to build too close to

2011] *The Informed Consumer is a Healthy Consumer?* 537

entire town, a ban may be designed only to apply to certain areas where obesity is prevalent or consumers may be vulnerable to overconsumption because there is a shortage of other healthy food options.<sup>187</sup> For example, in 2008, Los Angeles passed an ordinance prohibiting construction of new fast food restaurants in a thirty-two-square-mile area inhabited by 500,000 low income people.<sup>188</sup> In the wake of this ordinance, many franchises and workers complained that the zoning ordinance ignored the jobs the restaurants would bring to the neighborhoods as well as the attempts by these restaurants to create healthier menus.<sup>189</sup> This approach is another more extreme method of combating obesity and increases the restrictions and red-tape for many restaurant businesses. However, some argue that zoning may be effective in reducing obesity when combined with menu labeling by simultaneously educating citizens on the healthiness of food and limiting access to unhealthy foods in areas where restaurants featuring high calorie foods are prevalent.

#### *V. Encourage Better Choices / Do not Dictate*

Is menu labeling the best way to control obesity and promote a healthy lifestyle in America? The answer to this question remains to be seen. However, it does seem fairly certain that while menu labeling might not be the “cure” for obesity that America is looking for, it will be an important step in promoting health awareness. The current availability of unlimited, cheap, high calorie foods coupled with a minimal need for energy expenditure must be brought into check. Because obesity imposes a massive burden on American taxpayers and has become a full-fledged epidemic, governmental intervention is warranted. The best alternative to fight obesity in America is one that raises money to pay for healthcare, creates a generally healthier nation lowering the burden of healthcare costs on the American people,

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an already existing drive-thru restaurant).

<sup>187</sup> JULIE SAMIA MAIR ET AL., *THE CITY PLANNER’S GUIDE TO THE OBESITY EPIDEMIC: ZONING AND FAST FOOD*, 6 (2005), available at <http://www.publichealthlaw.net/Zoning%20City%20Planners%20Guide.pdf>.

<sup>188</sup> Molly Hennessy-Fiske & David Zahniser, *Council Bans New Fast-Food Outlets*, L.A. TIMES, July 30, 2008, <http://articles.latimes.com/2008/jul/30/local/me-fastfood30>; Los Angeles City (last visited Mar. 21, 2011); Council, Office of the City Clerk. *Council File Number: 07-1658* (May 25, 2007) <http://cityclerk.lacity.org/CFI/DisplayOnlineDocument.cfm?SRT=D1&cfnum=07-1658> (last visited Mar. 21, 2011).

<sup>189</sup> Hennessy-Fiske & Zahniser, *supra* note 188.

and only minimally interferes with both business and consumers' lifestyles and choices. Thus, in light of these goals, positive governmental programs that incentivize and educate people on how to live healthy lifestyles, as opposed to those that create disincentives for those making unhealthy choices, are the best options.

Therefore, in order to provide lower income individuals with the ability to afford healthy foods and to incentivize restaurants to use healthier ingredients in their dishes, the upcoming Farm Bill should include subsidies for fruits and vegetable farmers among the other main subsidies. If subsidies are given to producers of healthy foods and higher calorie items begin to reflect their unsubsidized costs, healthier foods may become more affordable and accessible for those who previously could not afford to buy these items.<sup>190</sup> Additionally, research should also be done on whether it is economically feasible to limit or decrease certain subsidies for producers of products known to contribute to increased consumption of saturated fats, and high fructose corn syrup.<sup>191</sup>

Moreover, initiatives like menu labeling, the recent ban on soda and candy in schools, the Healthy Food Financing Initiative, and First Lady Michelle Obama's "Let's Move!" anti-obesity campaign must be promoted as these are all doing their part to educate consumers and bring nutrition into the forefront of consumers' minds when they make their daily choices of eating and drinking. Using these types of educational programs to supplement menu labeling may create a greater demand for healthy products and awareness of the importance of bodily health. Positive campaigns that incentivize healthy consumer behavior, such as menu labeling, are changing the market for foods and drinks as companies and restaurants are already beginning to advertise and develop healthier dietary options. By creating a greater demand for nutritious foods, other more severe governmental interference may not be necessary as market forces change and restaurants and grocers begin to provide healthy foods to stay competitive. For example, the grocery chain

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<sup>190</sup> Farnese, *supra* note 179, at 391.

<sup>191</sup> Richard Atkinson, a professor of medicine and nutritional sciences at University of Wisconsin-Madison and president of the American Obesity Association, thinks that removing subsidies from products like sugar, corn, and other fat-causing products would not affect their price in a significant way. However, he thinks that adding subsidies for vegetables and fruits may make a real difference in their accessibility. *See* Fields, *supra* note 183, at A823.

2011] *The Informed Consumer is a Healthy Consumer?* 539

Dominick's, a subsidiary of Safeway Inc., has noticed that more consumers are interested in nutrition education and living a healthier lifestyle.<sup>192</sup> Thus the company created a program called "SimpleNutrition" which uses color-coded tags to help consumers find healthy, affordable grocery items.<sup>193</sup> Additionally, America's largest beverage companies including PepsiCo, the Coca-Cola Company, and Dr. Pepper Snapple Group are adding new labels to the front of every container of drink products displaying the total calories each beverage contains.<sup>194</sup> The American Beverage Association explains that this new initiative was inspired by First Lady Michelle Obama's "Let's Move!" anti-obesity campaign and was designed to help consumers make informed, healthy choices.<sup>195</sup> The initiative posits that bringing the relative calorie content of these drinks to the consumers' attention may encourage sugary soda drinkers to make healthier, lower calorie choices. In this way, the spread of menu labeling and other new governmental programs designed to combat obesity are helping consumers and businesses alike to focus first on nutrition and health.

Because companies and restaurants are changing their menus, business practices, and products in light of these new laws and campaigns, measures like a "soda tax" or zoning laws outlawing fast food restaurants may be an unnecessary step. These positive incentives to be healthy do not shift the responsibility to make healthy choices away from the consumer,

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<sup>192</sup> Press Release, Dominick's, About Us: Our Story, <http://www.dominicks.com/IFL/Grocery/Our-Story> (last visited Mar. 21, 2011).

<sup>193</sup> Press Release, Dominick's, SimpleNutrition: Program Overview, <http://www.dominicks.com/IFL/Grocery/SimpleNutrition-Program> (last visited Mar. 21, 2011). This program uses 22 health benefit messages on tags to inform the consumer of the nutritional value of the foods. In order to even have a tag with a nutrition benefit message the item must meet the following criteria: Total Fat: 13 grams or less per serving; Saturated Fat: 2 grams or less per serving; Cholesterol: 60 milligrams or less per serving; Sodium: 480 milligrams or less per serving for individual products, 600 milligrams or less for meal and main dish products; Beneficial Nutrients: 10% Daily Value or more per serving for vitamin A, vitamin C, calcium, iron, protein or fiber; Sugars: Most products contain limited amounts of sugars. After an item meets this baseline criterion, the item may be tagged with a specific nutrition benefit message, such as "gluten-free" or "low-sodium." *Id.*

<sup>194</sup> Press Release, American Beverage Association, New Calorie Labels On Front of Beverages Arrive In Stores (Feb. 8, 2011), <http://www.ameribev.org/nutrition--science/clear-on-calories/news-releases/more/235/> (last visited Mar. 21, 2011).

<sup>195</sup> *Id.*

and also allow for market forces to effect voluntary change. Because the government's power to regulate individual behavior is limited, obesity will only be cured when each consumer decides to be healthy. However, the more educated the consumer population is on nutrition, the more it may demand healthier foods. There is no freedom of choice when one does not even know the choices and thus, the law gives consumers real freedom of choice regarding nutrition at a minimal cost to restaurants. Hopefully, as menu labeling is implemented and consumers continue to learn more about healthy diets, market forces will continue to change and restaurants, as well as grocers, will continue to respond to their newly informed, nutrition savvy consumers.