

# ISSUE BRIEF

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## Obamacare's Menu Labeling Law: The Food Police Are Coming

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Obamacare requires restaurant chains to provide caloric and other nutritional information to customers on standard menu items.<sup>1</sup> The Food and Drug Administration (FDA), which is implementing this provision, could finalize its menu labeling rule this fall or even sooner.

The FDA estimates that first-year compliance costs could be as high as \$537 million for all regulated businesses covered under the rule.<sup>2</sup> In its fiscal year 2011 *Information Collection Budget*, the Office of Management and Budget listed this rule as imposing the third-largest paperwork and information-collection burden of any rule implementing new statutory requirements.<sup>3</sup> The cost to Americans, though, is more than just financial.

The menu labeling law presumes that bureaucrats in the government know better than restaurants and the public whether menu labeling should be provided to consumers and what nutritional decisions consumers should make. It imposes centrally planned mandates to achieve its objectives—without having any research to show any benefits of menu-labeling mandates. The FDA is making matters worse by using Obamacare to regulate far more than

restaurants or similar establishments despite not being able to identify any benefits to the rule.

**The Central Planning of Menus.** The Obamacare menu-labeling provision presumes that the government must change the decision making of consumers. This mindset also exists in the implementation of the rule. The FDA tries to justify the rule by claiming that consumers make misinformed decisions at restaurants and should demand more information from restaurants.<sup>4</sup>

If consumers want menu labeling, restaurants will respond by putting the necessary information on their menus. The restaurant business is extremely competitive and any way to gain an advantage will be employed. There is no need for the government to mandate labeling when the private sector already has an incentive to use menu labels to meet consumer demand.

Nor do consumers need government bureaucrats to define what constitutes the correct nutritional decision or what information is sufficient. Choosing higher-calorie meals, for example, is not necessarily evidence of being misinformed. Nutritional concerns are not the only consideration or even a significant consideration when consumers go to restaurants.<sup>5</sup> For many, calories may be the last thing they want to think about when going out to meals.

**The Research Does Not Support Menu Labeling.** Even for proponents of nutritional central planning, a menu-labeling standard is putting the cart before the horse. Existing research on whether menu labeling has an impact on nutrition is at best unclear. According to the United States Department of Agriculture's Economic Research Service, "The mixed results of these and other small-scale menu

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labeling studies suggest it is still too early to tell how restaurant calorie labeling will affect caloric intake.”<sup>6</sup>

The Obamacare menu-labeling law is modeled after a provision that has been in place in New York City since 2008.<sup>7</sup> New York University and Yale researchers collected receipts before and after the New York City law went into effect and found that individuals ordered *more* calories after the labeling law went into effect. They also ordered more calories than a similar population in Newark, where there was no labeling law.<sup>8</sup>

Proponents of menu-label mandates often respond to such studies by trying to identify why the results did not match desired expectations. One argument that has been used is that consumers also need calorie *recommendations* in order to make healthy choices. However, a just-released study published in the *American Journal of Public Health* regarding the New York labeling law found:

Providing calorie recommendation benchmarks—such as calories per day or calories per meal—did not reduce calories purchased, nor did it appear to help participants to better use the

calorie information posted on menus. In fact, we found some evidence that recommendations may even have promoted purchase of higher-calorie items.<sup>9</sup>

**The FDA Power Grab.** The menu-labeling law applies to a “restaurant or similar retail food establishment.” The FDA has interpreted this language to mean that even grocery and convenience stores would be covered under the law. Practically, the FDA has ignored the word *similar*.

Under the FDA’s rules, a food establishment is regulated under the law if it offers any food that is prepared and processed on site even if not intended for immediate consumption. For example, a grocery store whose floor space is 99 percent devoted to packaged goods would still be included if it has a deli counter.<sup>10</sup> According to an industry estimate for supermarkets only, the rule could cost more than \$1 billion in the first year alone, which is far more than the FDA’s estimated compliance costs for all regulated businesses.<sup>11</sup>

The FDA did offer an alternative interpretation to its proposed definition of “restaurant and similar retail food establishment” that would allegedly

1. The Patient Protection and Affordable Care Act, Public Law 111-148, Section 4205.
2. Food and Drug Administration, “Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments Notice of Proposed Rulemaking, Preliminary Regulatory Impact Analysis,” March 2011, p. 44, <http://www.fda.gov/downloads/Food/IngredientsPackagingLabeling/UCM249276.pdf> (accessed July 31, 2013).
3. Office of Management and Budget, *Information Collection Budget of the United States Government: 2011*, [http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/2011\\_icb.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/2011_icb.pdf) (accessed July 31, 2013).
4. Food and Drug Administration, “Food Labeling,” pp. 3-6.
5. See, for example, Rosanna Morrison, Lisa Mancino, and Jayachandran Variyam, “Will Calorie Labeling in Restaurants Make a Difference?” U.S. Department of Agriculture, Economic Research Service, March 14, 2011, <http://www.ers.usda.gov/amber-waves/2011-march/will-calorie-labeling.aspx> (accessed July 31, 2013).
6. Ibid.
7. Food Marketing Institute, comment regarding Food and Drug Administration, “Food Labeling,” November 21, 2011, <http://www.fmi.org/docs/newsletters-comments/omb-menu-labeling---omb-review-pursuant-to-executive-order-12866-and-13563.pdf?sfvrsn=2> (accessed July 31, 2013).
8. Brian Elbel et al., “Calorie Labeling and Food Choices: A First Look at the Effects on Low-Income People in New York City,” *Health Affairs*, Vol. 28, No. 6 (November/December 2009), <http://content.healthaffairs.org/content/28/6/w1110.full> (accessed August 5, 2013).
9. Julie S. Downs et al., “Supplementing Menu Labeling With Calorie Recommendations to Test for Facilitation Effects,” *American Journal of Public Health*, July 18, 2013, <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2013.301218> (accessed July 31, 2013).
10. *Federal Register*, Vol. 76, No. 66 (April 6, 2011), pp. 19191-19236, <http://www.gpo.gov/fdsys/pkg/FR-2011-04-06/html/2011-7940.htm> (accessed July 31, 2013). See the definitions of “restaurant or similar retail food establishment,” “restaurant food,” and “restaurant-type food,” as well as the preamble that discusses the coverage of the rule, such as on page 19198.
11. Food Marketing Institute, comment regarding “Food Labeling”; and Food and Drug Administration, “Food Labeling,” p. 44. The FDA, in its preliminary regulatory impact analysis, estimates that the first-year compliance cost to grocery store chains (excluding convenience stores) would be only as high as \$19.3 million.
12. *Federal Register*, p. 19198.

exclude grocery stores and convenience stores.<sup>12</sup> Even though this less costly alternative definition would achieve the statutory objectives, the FDA still proposed the overbroad definition, which allows it to regulate more businesses than even Obamacare intended to cover.

If this were not bad enough, the FDA did not estimate the benefits of the proposed rule: “Food choice and consumption decisions are complex, and FDA is unaware of any comprehensive data allowing accurate predictions of the effect of the proposed requirements on consumer choice and establishment menus.”<sup>13</sup>

**Defund the Rule.** The menu-labeling provision should be repealed and, until such time, all funding for implementation of the FDA rule should be

withheld through the appropriations process, including through the complete defunding of Obamacare.

The rule would subject Americans to an unnecessary menu-labeling requirement that is not supported by the research and, according to the FDA, has no identifiable benefits. There would be plenty of costs, though.

More importantly, the freedom of Americans to demand their own nutritional information and make their own dietary choices should not be sacrificed to appease self-appointed nutrition czars who want to change consumer behavior to meet their own social engineering goals.

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13. Food and Drug Administration, “Food Labeling,” p. 12.