

Effective National Menu Labeling Requires Accuracy and Enforcement

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IN 2010, THE PATIENT PROTECTION AND AFFORDABLE Care Act amended the Food and Drug Administration's (FDA) authority to require the disclosure of nutrition information of foods and beverages sold in chain restaurants and similar retail food establishments.¹ The FDA issued the final rules on menu labeling in December 2014, and the regulations were expected to go into effect in December 2015.² This timeline was delayed several times³ and, at the time of this writing, there has been congressional action in the House of Representatives that could both change the timeline and weaken the labeling requirement if also passed in the Senate.⁴ Failing further legislative action, FDA Commissioner Scott Gottlieb has expressed his support of menu labeling and his intent to move ahead with the revised compliance date of May 7, 2018.^{5,6} In this commentary, we review the literature on restaurant nutrition mislabeling, and argue that enforcement is a crucial component of menu labeling law implementation.

Although menu labeling requirements may provide opportunities for consumers to make more informed food choices, the meaningful impact of this policy rests on the accuracy of the nutrition information provided. As then-President Sonya L. Connor said in an Academy of Nutrition and Dietetics statement supporting the final menu labeling requirements in 2014: "These initiatives are supported by legitimate research, but to be truly effective must include nutrition education and policy evaluation, and ensure calorie counts are accurate."⁷ Most research has focused on the efficacy of menu labeling, whereas the accuracy of menu nutrition labels has been largely overlooked. Existing literature and press coverage, while limited, indicate that inaccuracy is indeed a serious issue.⁸⁻¹⁴ As the FDA guides industry to comply with the new regulations, the agency should also develop appropriate monitoring protocols and conduct

rigorous enforcement to ensure that the nutrition information is accurately calculated and communicated.

NATIONAL MENU LABELING LAW

In 2006, New York City became the first jurisdiction to adopt nutrition labeling at chain restaurants.¹⁵ Although opposed by many in the food industry,^{15,16} various state and local policymakers followed suit and passed similar laws.¹⁷ By 2011, two states and nine localities had implemented menu labeling regulations.¹⁸ As menu labeling gained political momentum, some businesses and interest groups became increasingly supportive of a national labeling policy, citing the variability in local laws and the operational burden for establishments that must comply with a patchwork of local provisions.¹⁸ In 2010, the passage of the Patient Protection and Affordable Care Act Section 4205 made menu labeling federal law, preempting any existing state and local labeling laws that apply to the same restaurants but that are not identical to federal law.² Under the FDA's rule, menus and menu boards must disclose the calorie content of any standard menu item in restaurants and similar food retail establishments with 20 or more locations.² Food establishments subject to the regulation will also be required to calculate additional nutrient information, available upon request.²

ACCURACY OF MENU LABELING

Most existing research focuses on the effect of menu labeling on consumer behaviors and, so far, the evidence is mixed.¹⁹⁻²⁴ Current research indicates that there is considerable heterogeneity in consumer responses, and menu labeling may be particularly helpful to consumers that are health conscious and individuals who have been instructed by health professionals to monitor their energy intake.^{25,26} In addition, menu labeling may benefit consumers through education and encourage industry food reformulation.²⁷ Federal menu labeling will bring new information to diverse populations and, notably, will be required to include a 2,000-calorie statement on menus to contextualize labeling information, which was found to increase efficacy.²⁸ Any benefit from the provision of calorie and additional nutrition information is contingent on the accuracy of the information, yet literature assessing the accuracy of restaurant nutrition labels is extremely limited. Our literature review identified three peer-reviewed publications, three news media articles, and one news documentary on this topic (Table). Although limited, this research provides some evidence that there may be substantial inaccuracies in some restaurant chains and particular type of dishes.

Table. Summary of literature assessing the accuracy of menu labeling

First author	Year	Type of literature	Methods and results
Urban ⁸	2010	Peer-reviewed publication	29 reduced-energy restaurant foods tested contained 18% more calories than stated on average, but the difference did not achieve statistical significance.
Urban ⁹	2011	Peer-reviewed publication	269 foods from 42 restaurants were tested; stated energy content was largely accurate, 19% contained at least 100 calories more per portion than stated. Calories tended to be understated for foods with lower energy contents, while foods with higher stated energy contents contained lower measured calories.
Feldman ¹⁰	2015	Peer-reviewed publication	150 food samples from a university using contracted foodservices were tested; 10% discrepancy between measured and labeled was found in six nutrients. In most mislabeling cases, measured values were higher than stated.
Scripps Howard News Service ¹³	2008	News article	Out of the 23 foods tested, 70% contained more calories and 78% contained more fat than stated. Some over-reporting was also detected.
Consumer Reports Magazine ¹²	2013	News article	17 foods from 12 restaurants were tested; nutrition information was largely accurate, but large errors were found in a few dishes and chains. Most cases appeared to be under-reporting.
Avila ¹¹	2013	News article	11 out of 24 food samples tested contained more calories than stated and 10 contained fewer calories than stated.
Neistat ¹⁴	2013	News documentary	Five items that may be consumed during an average day were tested; four contained more calories than labeled, totaling 550 calories. One contained fewer calories than labeled.

Using bomb calorimeters to test the actual energy content in restaurant dishes, Urban and colleagues⁹ found that 20% of tested samples contained at least 100 calories per portion more than stated, and 10% contained an average of 250 calories more than stated. These researchers also found that low-calorie foods were particularly prone to labeling error, containing on average 18% more calories than stated, with some dishes containing twice the stated calories.⁸ In a university with contracted food services, Feldman and colleagues¹³ found >10% average discrepancy between measured and labeled nutrients. Menu labeling inaccuracy has also been explored in news coverage. In 2008, Scripps News tested 23 food items and reported that 78% of the samples exceeded the fat content labeled and 70% contained more calories than labeled, including one dish that had 522 calories more than the 500 calories labeled.¹³ Future reports such as these may undermine consumer confidence in nutrition labeling.

Inconsistent portioning is one likely source of inaccuracy. Even with standardized recipes, food items prepared at different locations may vary considerably in portion sizes due to human errors or lack of training.⁹ Labeling errors could also occur depending on the methods used by companies to determine the nutrition content. In the final rule, the FDA does not require companies to use laboratory analysis to determine the nutrition content of their products due to potential high costs.² Alternative methods allowed by the FDA, such as the use of nutrition databases, may increase the likelihood of labeling errors. This leaves it to enforcement strategies to help ensure accuracy.

ENFORCEMENT MECHANISMS

The final rule contains some language on how the FDA plans to enforce the labeling rule, but it is unclear whether the agency and local authorities have the resources to do so. The FDA will assess compliance on a case-by-case basis, considering a number of factors, including “the method...used by the covered establishment to determine nutrition information, and the steps taken by the establishment to ensure that the method of preparation and amount of a standard menu item adhered to the factors on which its nutrient values were determined.”² The FDA also has the authority to conduct laboratory analysis if the nutrient disclosure appears false or misleading. If a restaurant fails to label a standard menu item in accordance with the regulations, the FDA can deem the item misbranded and initiate a number of actions, including warning letters, seizures, fines, injunctions, and prosecution.²

There are additional ways that labeling requirements could be enforced. First, in the case that states and localities establish labeling rules identical to the federal labeling regulations, which is permitted in the final rule, the state or local government can enforce its own rules. Second, the FDA may enforce labeling requirements through appropriate state or local officials, such as public health departments or health inspectors, who could act on FDA’s behalf to enforce federal labeling requirements.² The FDA has a history of partnering with states to conduct inspections in other contexts, such as food processing facilities, and the agency has stated that it expects such cooperation in order to enforce menu labeling rules.² Lastly, state attorneys general are permitted in certain circumstances to “bring in [their] own name and within

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