



## Department of Health and Mental Hygiene

### Board of Health

#### Notice of Adoption of Amendments to Article 81 of the New York City Health Code

In compliance with §1043(b) of the New York City Charter (the Charter) and pursuant to the authority granted to the Board of Health (the Board) by §558 of said Charter, a notice of intention to amend Article 81 of the New York City Health Code (the Health Code) was published in the City Record on June 23, 2015, and a public hearing was held on July 24, 2015. Three people testified and four written comments were received, including three from people who testified. In response to comments, a change was made to the effective date of the amendments. At its meeting on September 9, 2015, the Board adopted the following resolution.

#### Statement of Basis and Purpose

##### *Statutory Authority*

These amendments to the Health Code are promulgated pursuant to sections 558 and 1043 of the Charter. Sections 558(b) and (c) of the Charter empower the Board to amend the Health Code and to include in the Health Code all matters to which the authority of the New York City Department of Health and Mental Hygiene (the Department) extends. Section 556 of the Charter authorizes the Department to supervise and regulate the City's food supply. Section 1043 grants the Department rule-making authority.

##### *Background*

The Commissioner of the Department is the "permit issuing official" designated in the State Sanitary Code (10 NYCRR Chapter 1, Subpart 14-1) to enforce provisions of the Sanitary Code applicable to the operation of food service establishments in New York City. In the City, food service establishments are also subject to provisions of the City's Health Code and to Chapter 23 of the Department's rules, found in Title 24 of the Rules of the City of New York. The Department's Division of Environmental Health enforces the provisions of the State Sanitary Code and the City's Health Code, as well as the Department's rules applicable to such establishments.

In 2006, the Board adopted a Health Code provision requiring certain restaurants to post calorie information in an effort to combat the emerging epidemic of obesity and associated diseases, including, type 2 diabetes. After that provision was found to be unenforceable by a federal court, the Board adopted the current version of section 81.50 on January 22, 2008. The authority of the Board to require that chain restaurants provide this information to their customers was upheld by the courts (*N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009)) and, in 2008, the City became the first jurisdiction in the United States to require chain restaurants to post calorie information on menus and menu boards.

Other jurisdictions around the country soon followed by enacting similar provisions and, in 2010, Congress included language in the Patient Protection and Affordable Care Act (the ACA) which mandated nationally that chain restaurants post calorie information and have other nutrition information available on premises for their customers. (Pub.L. No. 111-148 §4205 (2010)). The ACA directed the FDA to adopt regulations implementing nutrition labeling for restaurants that include calorie information. Those regulations were published in December, 2014 and will take effect on December 1, 2015. (21 CFR 101.11). Although they will be in effect, the FDA recently announced that it will be issuing additional

guidance for covered establishments which will not have to comply with the rules until December 1, 2016. (80 FR 39675). Establishments in the City that are covered by these federal regulations will be required to comply with them.

Although the federal requirements for menu labeling are largely similar to the requirements in the Health Code, there are some differences. Restaurants with 20 or more locations nationally will be subject to the federal regulations, while the current Health Code requirements apply to restaurants with 15 or more locations nationally. For example, restaurants covered by the new federal regulations will have to include a statement on their menus advising patrons about the number of calories that should be consumed daily. These restaurants also will have to advise patrons that additional nutrition information is available on premises for anyone who wishes to see it. The Department can enforce posting requirements in the Health Code that are identical to the federal requirements and will continue to enforce such provisions for all restaurants with 15 or more locations nationally after the federal regulations take effect on December 1, 2015. Where the Health Code currently requires a posting that the federal regulations will not, the Department will be preempted from enforcing the Health Code requirements in restaurants subject to the federal regulations.

Accordingly, the Health Code section 81.50 is being repealed and reenacted so that its requirements are identical to the federal requirements. In order to allow covered establishments to benefit from the additional time allowed by the FDA for compliance, the effective date of the reenacted section 81.50 is being made effective on December 1, 2016. Restaurant-like establishments, which are not yet required to provide calorie information, will benefit from the FDA's guidance and this additional time as they plan to come into compliance. Chain restaurants that currently post calorie information will continue to do so pursuant to the current version of section 81.50. They, however, will not be required to post the additional signs and provide the additional nutrition information required by federal law, and incorporated into the new version of section 81.50, until December 2016. In response to a comment, the definition of "similar food retail establishment" has been clarified.

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this Department, unless otherwise specified or unless the context clearly indicates otherwise.

New material is underlined.

RESOLVED, that Section 81.50 of Article 81 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, requiring the posting of calorie information, is REPEALED and reenacted, to be printed together with explanatory notes, to read as follows:

**§81.50 Posting of calorie information.**

(a) Definitions. When used in this section the following words and terms have the following meanings:

(1) *Combination meal* means a standard menu item that consists of more than one food item. A combination meal may be represented on the menu or menu board in narrative form, numerically, or pictorially. Some combination meals may be a variable menu item where the components may vary and the customer selects which components will be included in the meal. Some combination meals may include a variable menu item as a part of the meal. A combination meal shall not mean a special price

offer to a customer to combine standard menu items for which calorie information is already posted on the menu or menu board.

(2) Covered establishment means a food service establishment or similar retail food establishment that is part of a chain with 15 or more locations nationally doing business under the same name and offering for sale substantially the same menu items, or a food service establishment or similar establishment that is not part of such a chain that voluntarily registers with the United States Food and Drug Administration to be subject to the federal requirements for nutrition labeling of standard menu items pursuant to 21 CFR 101.11(d), or successor regulation.

(3) Custom order means a food order prepared in a specific manner in response to an individual customer's request, which requires the covered establishment to deviate from its usual preparation of a standard menu item.

(4) Daily special means a food item prepared and offered for sale on a particular day that is not routinely listed on a menu or menu board, or other offer and that is promoted by the covered establishment as a special item for that day.

(5) Food on display means restaurant-type food that is visible to the customer before the customer makes a selection, so long as there is not an expectation of further preparation by the customer before consumption.

(6) Food that is part of a customary market test means food that appears on a menu or menu board for less than 90 consecutive days to test customer acceptance of the food.

(7) Menu or menu board means a printed list of the names or images of a food item or items and the prices of such items, that is the primary writing of a covered establishment from which a customer makes an order selection. Menus include breakfast, lunch, and dinner menus; dessert menus; beverage menus; children's menus; other specialty menus; electronic menus; and menus on the internet, and may be in various forms, including booklets, pamphlets, single sheets of paper, or electronic screens. Determining whether a writing is or is part of the primary writing of a covered establishment depends on a number of factors, including whether the writing lists the name of a standard menu item (or an image depicting the standard menu item) and the price of the standard menu item, and whether the writing can be used by a customer to make an order selection at the time the customer is viewing the writing. Menu boards include menu boards inside the establishment as well as drive-through menu boards outside the establishment.

(8) Offering for sale substantially the same menu items means offering for sale a significant proportion of menu items that use the same general recipe and are prepared in substantially the same way with substantially the same food components.

(9) Similar retail food establishment means an establishment such as a convenience store, grocery or supermarket that serves restaurant-type food.

(10) Restaurant-type food means food that is (i) usually eaten on the premises of or while walking away from a food service establishment, or soon after arriving at another location, or (ii) processed and prepared primarily in a similar retail establishment and offered for sale to customers for either immediate or later consumption in or outside such establishment.

(11) Self-service food means restaurant-type food that is available at a salad bar, buffet line, cafeteria or similar self-service facility that is served by customers themselves and includes self-service beverages.

(12) Standard beverage fill means the fixed amount of a beverage that is less than the full volume of the cup holding the beverage per cup size.

(13) Standard ice fill means the fixed amount of ice in a cup of a beverage per cup size.

(14) Standard menu item means any individual food item or combination of food items listed or displayed on a menu or menu board that is sold by a covered establishment.

(15) Temporary menu item means a food item that appears on a menu or menu board for less than a total of 60 consecutive and non-consecutive days during a calendar year

(16) Variable menu item means a standard menu item that comes in different flavors, varieties or combinations and is listed as a single menu item.

(b) Scope and applicability. This section applies to standard menu items offered for sale in covered establishments and does not apply to condiments, daily specials, temporary menu items, custom orders, foods that are part of a customary market test or temporary menu items, or to any menu or menu board in a school that is for students in grades 12 or under.

(c) Posting calorie information.

(1) Number of calories. Menus and menu boards must provide the number of calories contained in each standard menu item. Information must be posted for each item as it is usually prepared and offered for sale. For multiple-serving standard menu items, calorie information must be posted either (i) for the standard menu item as listed, or (ii) for a discrete serving unit provided that the total number of discrete serving units contained in such item is also posted.

(2) Position, size and color of calorie information. The number of calories must be listed adjacent to the name or price of the associated standard menu item in a type size that is no smaller than the smaller of either the name or price of the standard menu item. Calorie information must appear in a color that is the same or at least as conspicuous as that used to list the name of the associated standard menu item and against the same contrasting background, or a background at least as contrasting, as that against which the name of the associated standard menu item is listed.

(3) "Calories" or "Cal" The term "Calories" or "Cal" must appear either adjacent to the number of calories for each menu item or as a heading above a column listing the number of calories for each standard menu item. Such term appearing adjacent to calorie information for a standard menu item must

meet the same font requirements as such calorie information. Such term appearing as a heading above a column must be listed in a type size that is no smaller than the smallest type size used to list the name or price of any menu item on that menu or menu board and in the same color, or as conspicuous a color, and against the same contrasting background, or a background at least as contrasting, as that used for that name or price.

(4) *Basis for calorie information.* Posted calorie values must have a reasonable basis, which may be derived from the use of nutrient databases, laboratory testing, or other reliable methods of analysis, and be rounded to the nearest ten (10) calories for calorie content values above 50 calories and to the nearest five (5) calories for calorie values 50 calories and below. Zero calories may be declared for any item containing fewer than five (5) calories.

(5) *Self-service food and food on display.* Calorie information must be declared for self-service food and food on display. The calorie information must be declared either (i) for each food item or, (ii) if the food item is not offered for sale in a discrete unit, per serving measured by a standard scoop or cup size. The declaration must identify the serving or discrete unit used to determine the calorie content. The calorie information must be posted either on a sign adjacent to and clearly associated with the corresponding food, or on a sign attached to a sneeze guard above the food item. The sign must identify the food item for which it is declaring calorie information if it is not otherwise clear to which food item the declaration belongs, or, if calorie information is being declared for more than one food item, on a sign or placard located where the customer can view both the food items listed on the sign and their calorie declarations. For self-service beverages, calorie declarations must be accompanied by the total number of fluid ounces in the cup indicated by the term “fluid ounces” and, if applicable, a description of cup size, e.g., small, medium, etc. as applicable.

(6) *Different sizes, flavors and varieties; toppings; combinations.*

(A) *Different sizes, flavors and varieties.* For standard menu items offered in different flavors and varieties, calories must be posted for each listed size, flavor or variety. If all of the listed sizes, flavors or varieties of a standard menu item have the same calorie amount, menus and menu boards must list a single calorie declaration for the standard menu item. If there are only two calorie amounts for all sizes, flavors and varieties of a standard menu item, both calorie amounts must be posted on menus and menu boards for the menu item with a slash between the two calorie amounts. For sizes, flavors and varieties of a standard menu item having more than two calorie amounts, the range of calorie amounts must be posted on menus and menu boards for each such size, flavor and variety.

(B) *Toppings.* When toppings can be added to a standard menu item and such toppings are listed on menus and menu boards, the calories for the standard menu item must be listed as well as the calories for each such topping.

(C) Combinations. When a menu or menu board lists two options for standard menu items in a combination meal, the calories must be declared for each option with a slash between the calorie declarations. If three or more options for standard menu items in a combination meal are listed, the range of calorie content values showing the minimum to maximum numbers of calories for all combinations of that standard menu item shall be listed on menus and menu boards. If there is only one possible total calorie amount for the combination, then that total must be listed on menus and menu boards.

(7) Beverages that are not self-service. Calories declared for non-self-service beverages must be based on the full-volume of the cup or other container served without ice. If the establishment usually dispenses and offers for sale a standard beverage fill or a standard ice fill, the calories declared must be based on such standard beverage fill or standard ice fill.

(d) Required nutritional information statements.

(1) General requirement. Menu boards and each page of a menu for a covered establishment must prominently state in a clear and conspicuous manner: “2,000 calories a day is used for general nutrition advice, but calorie needs vary.”

(2) Children’s menus. Instead of the requirement of subparagraph 1 of this paragraph, menus and menu boards, and pages of menus, targeted for children may state either: “1,200 to 1,400 calories a day is used for general nutrition advice for children ages 4 to 8, but calorie needs vary.”; or “1,200 to 1,400 calories a day is used for general nutrition advice for children ages 4 to 8 years and 1,400 to 2,000 calories a day for children ages 9 to 13 years, but calorie needs vary.”

(e) Additional written nutritional information. Covered establishments must have written nutritional information on the premises in the manner provided for in 21 CFR 101.11(b)(2)(ii), or successor regulation. The information must be made available to any customer who requests it. All menus and menu boards must prominently state in a clear and conspicuous manner: “Additional nutritional information available upon request.”

(f) Enforcement. In addition to the Department, the Department of Consumer Affairs may enforce the requirements of this section.

(g) Severability. If any provision of this section, or its application to any person or circumstance, is held invalid by any court of competent jurisdiction, the remaining provisions or the application of the section to other persons or circumstances shall not be affected.

(h) Effective date. This section takes effect December 1, 2016.

*Notes:* Section 81.50 was repealed and reenacted by resolution of the Board of Health adopted at its meeting on September 9, 2015 to be identical to regulations of the US Food and Drug Administration in 21 CFR Part 101.