

LEGAL UPDATE

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MANDATORY DISCLOSURE OF CALORIE CONTENT OF MENU ITEMS

In an effort to combat the growing number of obese citizens of New York City, the New York City Board of Health (the "Board of Health") has mandated "point of decision" posting of calorie content of foods on the menus and menu boards of what are commonly referred to as "chain" restaurants in New York City.

In December 2006, the Board of Health adopted a resolution amending the New York City Health Code (the "Health Code") to require, effective July 1, 2007, food service establishments ("FSEs") that made calorie information publicly available by means such as the internet or pamphlets on or after March 1, 2007 to post such information on their menus and menu boards. The New York State Restaurant Association challenged this regulation in a lawsuit brought in the United States District Court for the Southern District of New York. Ultimately, the court affirmed the authority of local governments to mandate that restaurants disclose nutritional information, but held that the regulation was preempted by federal law to the extent it applied only to FSEs which had voluntarily provided calorie information to the public.

The Board of Health subsequently rewrote the regulation to comply with the district court's ruling and on January 22, 2008, the Board of Health adopted a resolution amending the Health Code so that, effective March 31, 2008, calorie content values of menu items must be clearly visible to patrons of FSEs at the time of ordering. This information is required to be posted by any FSE within the City of New York that is one of a group of fifteen (15) or more food service establishments doing business nationally, offering for sale substantially the same menu items in servings that are standardized for portion size and content, that operate under common ownership or control, or as franchised outlets of a parent business, or do business under the same name ("Covered Food Service Establishment").

Under the new rule, calorie information for all menu items, including combination meals, is required to be posted clearly and conspicuously in close proximity to

the corresponding menu item, using a font and format that is at least as prominent, in size and appearance, as that used to post either the name or price of the menu item. Additionally, if a Covered Food Service Establishment displays an item for sale with a food item tag, the food item tag must include the calorie content value for that food item in a font size and format at least as prominent as the font size of the name of the food item. Calorie content values are to be posted in kcal and must be based upon a verifiable analysis of the menu item such as information from nutrient databases, laboratory testing or other reliable methods of analysis, and must be rounded to the nearest ten (10) calories for calorie content values above fifty (50) calories and to the nearest five (5) calories for calorie content values fifty (50) calories and below.

If a Covered Food Service Establishment offers menu items in different flavors and varieties, such as different beverages, ice cream flavors, and doughnut varieties, the range of calorie content values reflecting the minimum to the maximum numbers of calories for all flavors and varieties of each item must be listed on menus and menu boards for each size offered for sale. However, if each flavor or variety of the food item is displayed for sale and its calorie content information is properly displayed on the food item tag identifying each flavor or variety of the food item, the range of calorie content information for each of the different flavors or varieties need not be displayed on the menus or menuboards.

Additionally, for combinations of different food items listed or pictured as a single menu item, the range of calorie content values showing the minimum to maximum number of calories for all combinations of that menu item must be displayed.

Covered Food Service Establishments can voluntarily provide additional nutritional information other than calorie content information, and can voluntarily provide a disclaimer stating that there may be variations in calorie content values based on slight variations in serving size, quantity of ingredients or special ordering.

The foregoing is intended to summarize the principal issues relating to the New York City Board of Health's recent amendment of §81.50 the New York City Health Code. We would be happy to furnish you with the complete text of §81.50 of the New York City Health Code upon request or answer any questions you may have.

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Richard S. Frazer joined Pryor Cashman as a partner in 1998. Rich has focused on corporate finance and mergers and acquisitions, and has represented domestic and foreign companies and investment banks in connection with public and private debt and equity securities offerings. Rich has wide-ranging experience representing clients in their mergers, acquisitions, dispositions, joint ventures and other strategic alliances involving cross-border transactions, tender offers, recapitalizations, spin-offs, asset and stock purchases and leveraged buyouts across many industries, including information technology, software, telecommunications, media, apparel, restaurant, food and beverage, pharmaceuticals and retail.

Rich's practice also encompasses Securities and Exchange Commission (SEC) compliance, both for newly public companies, and established small, mid-sized and larger capitalization issuers, providing counseling regarding disclosure and regulatory obligations under the Securities Exchange Act of 1934 and the requirements of Sarbanes-Oxley.

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Melissa is a 2006 graduate of St. John's University School of Law, where she was a St. Thomas More Scholar and Frontline Editor for the Journal of Legal Commentary. While in law school, Melissa was a judicial intern for Judge Denise Cote in the United States District Court for the Southern District of New York.

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