July 29, 2015

New York City Department of Health and Mental Hygiene
Board of Health
Gotham Center, 42-09 28th Street, CN 31
Long Island City, NY 11101-4132
Resolutioncomments@health.nyc.gov

Re: Proposed Amendment to Article 81 of the New York City Health Code (Sodium Warning Label Proposal)

To Whom It May Concern:

The National Restaurant Association (the "Association") appreciates the opportunity to provide comment on the Board of Health's ("Board's") proposed amendment to Health Code Article 81 to add a new section 81.49 requiring chain food service establishments with 15 or more locations nationally to identify any menu items containing 2,300 mg of sodium or more by adding to menus a specified warning symbol and statement regarding the risk of increased blood pressure, heart disease, and stroke (the "Warning Label Proposal" or "Proposal").

The National Restaurant Association is the leading business association for the restaurant and foodservice industry which is comprised of one million locations employing 14 million people who serve 130 million guests daily. The Association represents more than 435,000 member restaurant establishments. Restaurateurs are job creators. Despite being an industry of predominately small businesses, the restaurant industry is the nation's second-largest private-sector employer, employing almost 10 percent of the U.S. workforce.

The restaurant industry in New York is integral to the economy and job creation. In fact, every $1 spent in New York's restaurants generates an additional $0.88 in sales for the economy and every extra $1 million spent in New York's restaurants generates an additional 20.6 jobs in the state. In 2015, restaurants account for 796,000 jobs in New York or 9% of employment in the state. New York City has a particularly high number of eating and drinking establishments, and thus, a high number of restaurants and employees impacted by costly regulations.

Our members agree with the Board that sodium reduction is important to the national discussion on health and wellness. To that end, the Association is supportive of voluntary, uniform efforts to sodium reduction. To be effective, any approach to inform consumers or to reduce dietary intake of sodium should focus on whole dietary patterns, which we believe is a better approach to health and wellness than a single focus on particular nutrients or particular foods.

We support working collaboratively with all stakeholders and broadening discussions toward a national dialogue on healthy eating, increased physical activity, and expanded consumer education. Indeed, restaurants across the country have voluntarily added more healthful items to

menus, reformulated existing offerings, and, within New York City, (and soon, across the rest of the nation) have disclosed nutrition information so that consumers may choose foods that meet their preferences and diet. Through these efforts, the restaurant industry has seen consumer demand for healthful and nutritional items increase, both among children and adults.

Under the Affordable Care Act, chain restaurants and similar retail food establishments with 20 or more locations will be required to post calorie information and make available to consumers additional nutritional information, including information on sodium, so that consumers will be presented with such information in a single uniform way and will have one consistent standard to evaluate the nutritional values of their food. In taking this action, Congress has recognized that the former patchwork of state and local requirements were confusing to consumers, inefficient, and costly to industry.[1] With the Food and Drug Administration's (FDA's) recent extension of the compliance date to December 1, 2016, restaurants across the nation will soon be updating their menus and menu boards to provide such information in a uniform, understandable way.

Public education is an important tool in equipping consumers with the information needed to make informed decisions that enable them to construct healthful diets. However, we firmly believe that posting warning labels on restaurant menus is not an effective strategy for the reasons articulated herein. In the comments below, we explain our view that the Proposal is arbitrary and capricious, violates the separation of powers doctrine, and would compel speech in violation of the First Amendment. The Board should unilaterally withdraw its Proposal and focus instead on constructive, lawful means by which to address consumer awareness of sodium and other nutrient content in the foods we consume across the entire spectrum of the food supply.

I. THE PROPOSAL IS ARBITRARY AND CAPRICIOUS

The Warning Label Proposal fails to meet the baseline requirement that any regulation must not be unreasonable, arbitrary, or capricious. *N.Y. State Ass'n of Counties v. Axelrod*, 78 N.Y. 2d 158 (1991); *Matter of Consolidated Nursing Homes, Inc. v. Comm'r New York State Dep't of Health*, 85 N.Y. 2d 326 (1995). As explained in more detail below, the proposal is arbitrary and capricious because it is not supported by the underlying science and data, would have inconsistent and arbitrary application to different types of food items and establishments, and would conflict with national public health strategy and recommendations.

A. The Proposal is Not Supported by the Underlying Science and Consumer Research

Before the Board adopts health-related policies, particularly policies that will significantly impact economic trade, compromise freedom of speech, improperly alarm consumers, and force restaurants to re-design and re-print menus, it must first establish that is has a rational basis for doing so. The Board has failed in this respect. More is required of the Board, including the considered evaluation of current nutrition and sodium science, as well as other consumer research. The Board must demonstrate the effectiveness of its misguided Proposal and take account of the potential unintended consequences of the proposed policy.

[1] *See, e.g.*, 155 Cong. Rec. E587 (daily ed. Mar. 9, 2009) (statement of Rep. Jim Matheson).

1. *The Proposal fails to account for the evolving state of sodium science.*

Recent studies challenge the underlying science cited by the Board related to sodium reduction and do not appear to have been considered by the Board. NRA would like to take this opportunity to remind the Board of the current sodium science available. We note at the outset, that public health policy is based on the merits of the underlying science, not simply the views of well-meaning regulators.

The recent Institute of Medicine (IOM) report, "Sodium Intake in Populations: Assessment of Evidence," concluded that, "the evidence from studies on direct health outcomes is inconsistent and insufficient to conclude that lowering sodium intakes below 2,300 mg per day either increases or decreases risk of [cardiovascular disease (CVD)] outcomes...or all-cause mortality in the general US population."[2] This 2013 IOM assessment suggests that the current upper limit (UL) may be inappropriate, as intakes below this could cause harm. Moreover, IOM's most recent evaluation of the science linking sodium intake to cardiovascular disease outcomes, did not define an intake range associated with optimal health or reduced risk of disease and suggested that no changes in intake recommendations be made until there was additional research available. The IOM report did not make a suggestion of any maximum daily intake level, but did conclude that excessive intake was associated with an increase in cardiovascular heart disease risk. The report was explicit in not defining what level of sodium intake constituted excessive.

A more recent meta-analysis by Graudal et al, which included over 250,000 participants indicated as with all other essential nutrients there is a u-shaped relationship between sodium intake and health outcomes.[3] When consumption deviated from the 2,645 – 4,945 mg range mortality increased, so that both excessively high and low consumption of sodium were associated with reduced survival. The study also found that there is little-to-no variation in health outcomes between individuals as long as their consumption remained within the ideal intake range (2,645 – 4,945 mg/day).

Additionally, NRA would like to highlight that there were three new studies published in the *New England Journal of Medicine* in 2014. Most notably, there were two Prospective Urban Rural Epidemiology (PURE) studies. These studies provided new evidence about sodium and potassium intake, which were estimated from morning urine specimens, and the association between these nutrients and blood pressure, major cardiovascular events, and death. These PURE studies, which included more than 100,000 adults, sampled the general population of 17 countries that varied in their economic development and acculturation to an urban lifestyle. Across this broad range of populations, the relation between sodium excretion and blood pressure was positive but non-uniform: it was strong in participants with high sodium excretion, modest in those with low-moderate range, and non-significant in those with low sodium excretion. The authors concluded from the findings that a very small proportion of the worldwide population consumes a low-sodium diet and that sodium intake is not related to blood

[2] Institute of Medicine. Sodium intake in populations: assessment of evidence. May 2013. Retrieved from http://www.iom.edu/Reports/2013/Sodium-Intake-in-Populations-Assessment-of-Evidence.aspx

[3] Graudal N, Jurgens G, Baslund B and Alderman MH. . Compared with usual sodium intake, low-and excessive- sodium diets are associated with increased mortality: a meta-analysis. *Am J Hypertens* 2014. Accessed at http://ajh.oxfordjournals.org/content/early/2014/04/25/ajh.hpu028.abstract

pressure in these persons, calling into question the feasibility and usefulness of reducing dietary sodium as a population based strategy for reducing blood pressure.

The Board does not appear to have considered the most recent scientific evidence regarding sodium intake. The totality of the science is contrary to the overly simplified approach proposed by the Board. The underlying legal standard requires more of the Board by way of in-depth scientific analysis and, in turn, how this analysis relates to the policy conclusions reached.

2. *Health-related policies should take a total diet approach, rather than focusing on single nutrients or single food items.*

Nutrition leaders and researchers have found that focusing on a single nutrient or food can distort our understanding of a total diet approach and thus overall health outcomes. Americans have a wide variety of lifestyles, which incorporate a wide variety of foods. Dietary guidance must take this diversity into account and consider how to encourage an overall balanced diet approach. The Academy of Nutrition and Dietetics (AND) embrace such an approach. In its position on a total diet approach to healthy eating, the Academy explains:

> "…that the total diet or overall pattern of food eaten is the most important focus of healthy eating. All foods can fit within this pattern if consumed in moderation with appropriate portion size and combined with physical activity. The Academy strives to communicate healthy eating messages that emphasize a balance of food and beverages within energy needs, rather than any one food or meal."[4]

The U.S. Centers for Disease Control and Prevention (CDC) also believe that all foods can fit within a healthful, overall dietary pattern if consumed in moderation with appropriate portion size and combined with physical activity.[5]

The Board's Proposal fails to consider overall dietary patterns and inappropriately focuses on a single nutrient to the exclusion of calories or other nutrients. The Association supports the concept that no one food is good or bad, but that the total diet needs to be considered. Because the Proposal fails to do so, the Association believes it is arbitrary and capricious.

3. *The Proposal inappropriately takes a one-size-fits-all approach, rather than accounting for individual dietary needs.*

As illustrated by the recent research summarized above, which calls into question population-based approaches to sodium reduction, it is inappropriate to apply a one-size-fits-all warning statement when individuals' sodium needs differ. Indeed, when considering the appropriate daily value for sodium in its recent proposed rule to update the nutrition labeling regulations, FDA discussed the "heterogeneity among individuals in blood pressure responses to changes in sodium" and that "Salt sensitivity differs among subgroups of the population as well as among individuals with in a subgroup."[6] To require a single warning statement for the general population, when individual needs for sodium vary, is confusing. The Board's approach would

[4] Position of the Academy of Nutrition and Dietetics: Total diet approach to healthy eating. *J Acad Nutr Diet.* 2013;113:307-317.
[5] Centers for Disease Control and Prevention. Healthy Weight: http://www.cdc.gov/healthyweight/healthy_eating/. Accessed May 4, 2015.

also mislead, as it is based on assumptions that are simply not true, and could cause consumers to avoid foods identified by the Board's criterion without considering their individual dietary needs.

4. The criteria used by the IOM, FDA, and in the Dietary Guidelines to set daily intake recommendations do not provide a basis for a mandatory warning statement.

The Board relies on the daily intake recommendations for sodium to develop a mandatory warning statement for any food item sold in certain chain restaurants that exceeds that recommendation. The warning statement would relate the consumption of that food item to an increased risk of blood pressure, heart disease, and stroke. The Board's reliance on the criteria relied upon by the IOM, FDA, and the Dietary Guidelines is inappropriate because these criteria are extremely poorly suited for developing a warning statement.

The IOM has recognized that the recommended daily intake for sodium is not a precise figure, and that sodium is not the sole factor related to blood pressure. The 2004 IOM report accompanying IOM's recommendation on the UL for sodium explains that "it is difficult to precisely set [a UL of sodium intake], especially because other environmental factors (weight, exercise, potassium intake, dietary pattern, and alcohol intake) and genetic factors also affect blood pressure."[7]

The challenges noted by IOM in recommending the daily value for sodium illustrate that the criteria for setting a daily value are not well-suited to provide the basis for a brief, blunt warning requirement. The relationship between sodium intake and blood pressure is a complicated one that depends on many factors, varies depending on the individual, and cannot easily be summarized in a single sentence. According to FDA, the daily value for sodium is established based on the UL for sodium, which is defined as the "highest level of daily nutrient intake that is likely to pose no risk of adverse health effects to almost all individuals in the general population."[8] The criteria for establishing the daily value, therefore, intend to set a level that is likely to pose no risk of adverse health effects to most individuals. It does not logically follow, however, that any food containing sodium above that level would pose a risk of adverse health effects to most individuals.

And yet this is the message that would be conveyed by the Warning Label Proposal. It is one thing to require restaurants to disclose the sodium content—as is required by the federal menu labeling law—so that a consumer can assess how that content fits in with daily sodium recommendations. It is quite another to require a warning label which suggests that consuming a single item of food that contains more than the recommended daily value of sodium could increase the risk of such serious conditions as high blood pressure, heart disease, and stroke. That message is not supported by the daily intake recommendations relied upon by the Board.

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[6] FDA Proposed Rule; Nutrition Facts Panel, 79 Fed. Reg. 11880, 11915 (Mar. 3, 2014).
[7] IOM, Dietary Reference Intakes for Water, Potassium, Sodium, Chloride, and Sulfate, Chapter 6: Sodium and Chloride (2005).
[8] 79 Fed. Reg. at 11914.

5. *The proposed use of a warning label is not supported by consumer research and may have serious unintended consequences.*

The Association finds seriously flawed the Board's conclusion that warning labels would be an effective means to reduce sodium intake. Moreover, we are concerned that the Proposal, if adopted, may have serious unintended consequences.

The Board states that "evidence suggests that health warnings, like the proposed sodium warning, can increase knowledge and decrease purchase/consumption of certain products. Importantly, however, the basis for this statement is a study of health warning messages on tobacco products.[9] The Association would like to point out that reliance on this study is misplaced. People do not biologically need tobacco products, whereas sodium is an element that the body needs to work properly. The body uses sodium to control blood pressure and blood volume. The body also needs sodium for your muscles and nerves to work properly.[10] Based on this critical difference, the Association fears that the proposed warning statements may give the impression that all sodium is bad. While we understand the intent is to flag high sodium items, we worry that consumers may be given the impression sodium generally is bad, which could have unintended health consequences.[11] The Board does not appear to have considered or evaluated the possibility of such consequences.

Through a literature review the Association identified two additional studies that examined the impact of warning labels on alcohol and high fat foods, respectfully.[12] [13] These studies found that while warning labels may increase consumer awareness and knowledge, they are ineffective in changing consumer behavior. Basing a significant nutrition regulation on as a single tobacco study – that contradicts the body of a field of literature that is very small to begin with – evidences the arbitrary and capricious nature of the proposed action.

The Proposal also runs counter to the significant body of consumer research demonstrating that consumers are best motivated to change their eating habits by positive messages, rather than messages demonizing foods. Research shows that empowering consumer choice is more effective than restricting it. Restricting choices by classifying specific foods as "good" or "bad"—or in this case, effectively restricting choices using an alarming warning symbol demonizing particular food items—is overly simplistic. In fact, a substantial body of research has shown that restriction may foster unhealthy eating behaviors, such as increased intake/preoccupation with restricted foods, poor weight management and reduced development of self-regulatory skills, particularly in children. [14,15,16,17,18,19,20,21,22,23,24,25,26,27,28,29,30,31,32,33]

[9] High sodium warning label: why it matters. City of New York. Accessed at http://www.nyc.gov/html/doh/downloads/pdf/cardio/high-sodium-warning-label.pdf
[10] Chen et al. Sodium in diet. *U.S. Nat Library Med.* May 13, 2014.
[11] Dugdale et al. Hyponatremia. *U.S. Nat Library Med.* April 14, 2013.
[12] Stockley, C. The effectiveness of strategies such as health warning labels to reduce alcohol-related harms- an Australian perspective. *Int J of Drug Policy.* July 1, 2001. 12; 153-166.
[13] Bushman, B. Effects of warning and information labels on consumption of full-fat, reduced-fat, and no-fat products. *American Psychological Association.* February 1998. 83 (1): 97-101.
[14] Clark HR, Goyder E, Bissell P, Blank L, Peters J. How do parents' child-feeding behaviours influence child weight? Implications for childhood obesity policy. *J Pub Health*. 2007;29:132-41.

Guiding Americans on which nutrient rich food choices to make, and focusing on portion guidance to provide "how to" practical advice, can help people make wise food choices within the context of the total diet.

The Board has ignored this substantial body of literature and instead proposed a negative message that singles out particular foods as "bad." This approach is simply not supported by the relevant consumer research. There appears to be no effort by the Board to commission appropriate consumer research from which to objectively evaluate its Proposal. More is required of the Board from the perspective of fashioning sound public policy and as a matter of law.

B. The Proposal Would Apply Inconsistently and Arbitrarily to Different Types of Foods and Establishments

The Board has devised a rule that would have inconsistent, unreasonable, and arbitrary application. The warning requirements would apply only to certain chain restaurants, and would not apply to higher sodium foods sold in other segments of the food industry, such as

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[15] Fisher JO, Birch LL. Restricting access to palatable foods affects children's behavioral response, food selection, and intake. *Am J Clin Nutr*. 1999; 69: 1264-72.
[16] Rollins BY, Loken E, Savage JS, Birch LL. Effects of restriction on children's intake differ by child temperament, food reinforcement, and parent's chronic use of restriction. *Appetite*. 2014; 73: 31-39.
[17] Jansen E, Mulkens S, Emond Y, Jansen A. From the Garden of Eden to the land of plenty Restriction of fruit and sweets intake leads to increased fruit and sweets consumption in children. *Appetite*. 2008; 51: 570-75.
[18] Jansen E, Mulkens S, Jansen A. Do not eat the red food!: Prohibition of snacks leads to their relatively higher consumption in children. *Appetite*. 2007; 49: 572-77.
[19] Temple JL, Chappel A, Shalik J, Volcy S, Epstein LH. Daily consumption of individual snack foods decreases their reinforcing value. *Eat Behav.* Aug 2008;9(3):267-276.
[20] Fisher JO, Birch LL. Restricting access to foods and children's eating. *Appetite*. 1999;32:405-19.
[21] Fisher JO, Birch LL. Eating in the absence of hunger and overweight in girls from 5 to 7 y of age. *Am J Clin Nutr.* Jul 2002;76(1):226-231.
[22] Francis LA, Birch LL. Maternal weight status modulates the effects of restriction on daughters' eating and weight. *Int J Obes (Lond).* Aug 2005;29(8):942-949.
[23] Rollins BY, Loken E, Savage JS, Birch LL. Maternal controlling feeding practices and girls' inhibitory control interact to predict changes in BMI and eating in the absence of hunger from 5 to 7 y. *Am J Clin Nutr.* Feb 2014;99(2):249-257.
[24] Bleser JA, Rollins BY, Savage JS, Birch, LL. Availability and Access to Candy within the Home is Associated with Children's Candy Intake in a Free Access Setting and Frequency of Candy Intake in the Home. Presented at The Obesity Society Conference; 2014 Nov 2-7; Boston, MA.
[25] Loth KA, MacLehose RF, Fulkerson JA, Crow S, Neumark-Sztainer D. Food-related parenting practices and adolescent weight status: a population-based study. *Pediatrics*. 2013
[26] Polivy J. Psychological consequences of food restriction. *J Am Diet Assoc.* Jun 1996;96(6):589-592; quiz 593-584.. Markowitz JT, Butryn ML, Lowe MR. Perceived deprivation, restrained eating and susceptibility to weight gain. *Appetite.* Nov 2008;51(3):720-722.
[27] Savage JS, Hoffman L and Birch LL. Dieting, restraint and disinhibition predict women's weight change over 6 y. *Am J Clin Nutr*. 2009 Jul;90(1):33-40.
[28] Kuiker RG, Boyce JA. Chocolate cake. Guilt or celebration? Association with healthy eating attitudes. Perceived behavioral control, intentions and weight loss. *Appetite*. 2014 Mar;74:48-54
[29] Urbszat, D., C.P. Herman, and J. Polivy. Eat, drink, and be merry, for tomorrow we diet: effects of anticipated deprivation on food intake in restrained and unrestrained eaters. *J Abnorm Psychol*, 2002. 111(2): p. 396-401.
[30] Polivy, J., J. Coleman, and C.P. Herman, The effect of deprivation on food cravings and eating behavior in restrained and unrestrained eaters. *Int J Eat Disord*, 2005. 38(4): p. 301-9
[31] Soetens, B., et al., Resisting temptation: Effects of exposure to a forbidden food on eating behaviour. *Appetite*, 2008. 51(1): p. 202-205.
[32] Cameron JD, Goldfield GS, Cyr M, Doucet E. The effects of prolonged caloric restriction leading to weight-loss on food hedonics and reinforcement. *Physiol Behav.* 2008;94:474-80.
[33] Mann, T. and A. Ward, Forbidden fruit: Does thinking about a prohibited food lead to its consumption? *International Journal of Eating Disorders*, 2001. 29(3): p. 319-327.

convenience and grocery stores, independent restaurants, stadiums and arenas, or vending machines. This is in spite of the fact that some of the highest sodium foods are offered for sale in these venues. As a result, a multi-serving meal in excess of 2,300 mg sold in a chain restaurant would be subject to a warning label, but the same food item sold in the frozen section of a grocery store or in a convenience store would not. There is no rational basis for the same menu items to be subjected to warning labels in one type of venue but not in another.

The illogic associated with this approach is even more extreme in light of the fact that consumers obtain the majority of their sodium from grocery and convenience stores rather than from restaurants. The Board states that restaurant and processed foods are the largest source of dietary sodium (77%). In fact, research by the CDC and Drewnowski et. al. demonstrates that consumers ingest the majority of their sodium from consumer packaged goods, not restaurant foods.[34] Specifically, grocery and convenience stores provide between 58.1% and 65.2% of dietary sodium, whereas quick service restaurants and full service restaurants together provide between 18.9% and 31.8% depending on age. There is no rational basis for singling out restaurants when the majority of sodium is ingested from grocery stores and convenience stores, which are not included in the Proposal.

Restaurateurs are primarily small business owners. This is the case even for chain restaurants, which frequently are owned and operated by small business franchisees. Thus, small businesses restaurant owners will most definitely suffer from the economic impact of this proposal while the ban will have no impact on convenience and grocery stores. It is simply unreasonable and unfair to impose a novel sodium warning requirement on only one segment of the food industry.

Even within a restaurant that is covered by the Proposal, the application would be inconsistent and nonsensical. The warnings would apply to the level of sodium "per total item" for restaurant foods, when consumers may not consume the entire restaurant item themselves, but may share the item with others or take a portion of it home. There is no recognition in the proposal that the amount of sodium consumed by each individual "per serving" may be well under 2,300 mg.

Another perverse result of the Proposal is that the sodium warnings would <u>not</u> apply to items that alone do not exceed 2,300 mg but that when ordered in multiples or in combination with other items exceed that amount. Indeed, under the Proposal, a combination meal would be subject to the warning requirement if it exceeds 2,300 mg, but if a restaurant offers the exact same food items in the meal as à la carte selections, in many cases no warning would be required because the individual items would not exceed 2,300 mg. This result is similar to the NYC soda ban, which would have prevented a consumer from purchasing a 32 oz soda, but would not have prohibited the sale of a 16 oz soda with free refills. Due to this and other inconsistencies in the application of the rule to different establishments, different foods, and differing ways of ordering a covered item, the trial court ruled that the soda ban was arbitrary and capricious. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. New York City Dep't of Health and Mental Hygiene*, 2013 WL 1343607 (N.Y. Sup. Mar. 11, 2013).

[34] Drewnowski A and Rehm C. Sodium Intakes of US Children and Adults from Foods and Beverages by Location of Origin and by Specific Food Source. *Nutrients* 2013 5 (6), 1840-1855.

The inconsistency of the Proposal when applied to different food items within a single restaurant underscores the fallacy of trying to apply warning statements to individual food items. In order to make sound dietary decisions, consumers must consider their overall dietary practices, rather than focusing rigidly on the nutrient content in one particular food item, which varies depending on how it is offered for sale on the menu (e.g., as a combination meal or an à la carte item), and how much of the menu item is consumed. The Proposal is arbitrary and capricious because of its uneven application to similar food items.

C. The Proposal Would Conflict with National Public Health Strategy and Recommendations

The Association strongly supports the requirement in the federal menu labeling rule to provide written nutrition information on sodium. Success in sodium reduction efforts will best come about from a flexible approach that provides nutrition information and choices to allow customers to make informed decisions regarding the food they eat. The Association has led the way in ensuring consumer access to national, uniform nutrition information. We joined forces with over 70 public health and stakeholder groups to advocate for a federal standard that gives families clear, easy-to-use nutrition information at the point of ordering, presented in a standardized format. Under the new federal menu labeling regulations, nutrition information, including sodium, will be available in more than 250,000 restaurant locations nationwide by December 2016. With this information, consumers will be able to make informed choices when dining out.

Additionally, many of our members enable consumers to customize their orders, allowing for individual variations such as lower sodium options. Increasingly, restaurant operators are striving to offer or expand the availability of lower sodium options.

The Board's Proposal is in conflict with this uniform federal approach because it declares that information and education on sodium are not enough and that consumers must be warned about certain high sodium foods. Moreover, the proposed warnings are premature given that federal menu labeling will soon take effect, and the impact of making sodium information more widely and consistently available has not yet been evaluated. The Proposal's failure to take into account a new sweeping federal mandate that ensures consumer access to information on the levels of sodium and other nutrients in restaurant foods (as well as in convenience and grocery stores) is profound.

Separately, with FDA's recent extension of the compliance date for the menu labeling rule to December 1, 2016, the NYC Proposal, which would be effective December 1, 2015, also would create significant implementation issues due to the conflicting timelines. FDA has established a single, uniform effective date. This date was recently adjusted to ensure, in part, that restaurants can make a smooth, cost-effective transition via changing-over menus in a reasonable, planned manner. The Proposal would remove that assurance for restaurants with NYC locations.

The warnings also undermine the federal *Dietary Guidelines for Americans* (DGA), which are issued by the U.S. Food and Drug Administration and U.S. Department of Agriculture. The DGA encourage a focus on overall dietary patterns rather than on specific food items. Indeed, the document is framed as providing information and advice for choosing a "healthy eating

pattern." The DGA recognize the concept of indulging in moderation so long as dietary practices generally conform to the recommendations. One example is in the context of calories, where the Guidelines recommend maintaining "calorie balance over time" rather than strictly limiting calorie intake daily. They advise limiting certain nutrients and food components; not eliminating those nutrients or food components. Nowhere in the DGA is there a suggestion that single food items can pose a health risk. In contrast, the warnings could create consumer confusion by suggesting there are certain individual foods that are dangerous. This message is alarming, potentially misleading, and inconsistent with federal public health messaging.

The Board has proposed a warning statement that is confusing and inconsistent in light of federal strategies for sodium reduction, including federal menu labeling, and federal dietary guidance, and is therefore arbitrary and capricious.

II. THE PROPOSAL VIOLATES THE SEPARATION OF POWERS DOCTRINE

New York courts have invalidated rules made by an agency when it improperly assumes the role of the legislature. See, *e.g.*, N.*Y. Statewide Coal. of Hispanic Chambers of Commerce v. New York City Dep't of Health and Mental Hygiene*, 16 N.E.3d 538, 547-48 (N.Y. 2014). To determine when an agency violates the separation-of-powers doctrine, a court will look to four factors articulated in *Boreali v. Axelrod*, 517 N.E.2d 1350, 1355-57 (N.Y. 1987): (1) whether the agency engaged in the balancing of competing concerns of public health and economic costs; (2) whether the agency created its own comprehensive set of rules without benefit of legislative guidance; (3) whether the challenged rule governs an area in which the legislature has repeatedly tried to reach agreement in the face of substantial public debate by interested factions; and (4) whether the development of the rule requires expertise in the field of health. Under any measure of the *Boreali* test, the Board's actions fail.

The Proposal has no basis in legislation and therefore is similar to the regulation considered in *N.Y. Statewide Coalition*, in which the Board "illicitly created the Portion cap rule on a clean slate" rather than conducting rulemaking. *Id.* at 543. The Board is attempting to require a sodium warning without any legislative guidance with respect to how sodium reduction efforts should be pursued.

The NYC Council is the sole legislative body in the City and the Board's authority is restricted to promulgating rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local Law" (NYC Charter S 1043). The City Council has tried, but failed to regulate sodium content in restaurant foods. A bill that would have placed an upper limit on sodium in kid's happy meals was twice introduced and twice failed to pass the NYC legislature, illustrating that the City Council has not reached consensus on how or whether to address the sodium content of restaurant foods. The bill, known as the *Healthy Happy Meals Bill* was originally introduced by former Council Member Leroy Comrie in 2011, and was re-introduced in August 2014 by City Council Member Benjamin J. Kallos. In both cases, the bill died in Committee.

Under the bill, restaurants would have been prohibited from selling or offering for free happy meals—defined as "incentive item[s] [offered] in combination with the purchase of a meal"—

unless the meal met certain nutritional requirements that included a 600 mg limit on sodium. The bill also would have banned restaurants from selling or offering for free "incentive item[s] in combination with . . . a single food item" unless that single item had less than 200 calories and 200 mg of sodium, among other criteria. That both bills died in Committee demonstrates that the NYC Council has chosen not to pass a law or adopt a policy regarding sodium in restaurant food. The Board may not act simply because the legislative body has elected to refrain from this type of legislation.

Moreover, the Proposal does not require any specific expertise of the Board. The text of the Proposal indicates the Board is relying solely on publicly available research and guidelines, as was the case in *Boreali*, in which the court struck down a regulation banning indoor smoking that was based on common knowledge of the harms of smoking. 517 N.E.2d at 1351.

While the Board has very broad powers under the New York City Charter, "the intention of the legislature with respect to the Board is clear. It is to protect the citizens of the city by providing regulations that prevent and protect against communicable, infectious and pestilent diseases." *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. New York City Dep't of Health and Mental Hygiene*, 2013 WL 1343607 (N.Y. Sup. Mar. 11, 2013). The courts were very clear in the striking down of the New York City soda ban that with respect to food, the Board's authority is limited to food cleanliness and sanitation. The Board has exceeded this grant of authority in issuing the Proposal and has therefore inappropriately assumed the role of the legislature.

It is clear that the Board is trying to circumvent the legislative process, and set policy by creating its own set of rules regarding sodium without the benefit of a legislative mandate or even guidance. The Board is engaging in law-making, acting beyond the scope of its limited authority over food cleanliness and sanitation, and infringing upon the legislative jurisdiction of the City Council of New York. For these reasons, the Proposal violates the separation of powers doctrine.

III. THE PROPOSAL WOULD COMPEL SPEECH IN VIOLATION OF THE FIRST AMENDMENT

The proposal would compel commercial speech in violation of the First Amendment. A bedrock principle of the First Amendment is that "regulating speech must be a last – not first – resort." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002). The proposal provides no justification for requiring restaurants to communicate a warning message for certain menu items, rather than adopting an approach that does not infringe upon speech. Where the City seeks to require restaurants to include a specific warning message on their menu boards, intermediate scrutiny applies. *See, e.g.*, *Evergreen Ass'n, Inc. v. City of New York,* 740 F.3d 233, 245 n.6 (2d Cir. 2014). Under this standard, in order to compel commercial speech, the government must establish a "substantial" interest and the law must "directly advance" that interest via a restriction that is "no more extensive than necessary." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980).

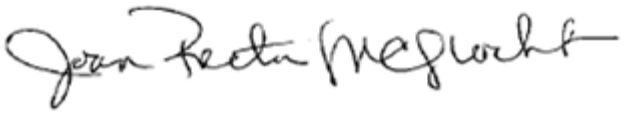
The City has failed to show that the proposed warning requirement is likely to directly advance its stated goal of reducing the incidence of high blood pressure. Indeed, the proposal cites no

research or evidence demonstrating the warning statement is likely to be effective rather than confusing to consumers. The City also has failed to demonstrate that the proposed requirement is no more extensive than needed. The proposal would compel restaurants to convey to their customers a message with which they do not agree; namely, that every consumer must be warned when a single food item contains enough sodium exceeding the recommended level of daily intake. The City should be aware that if it moves forward with the proposal, it would be compelling controversial commercial speech in violation of the First Amendment.

* * *

The Proposal is unlawful because it is arbitrary and capricious, violates the separation of powers doctrine, and unlawfully compels speech in violation of the First Amendment. The National Restaurant Association recognizes that there is a responsibility and a role for local officials in public health matters, but we do not believe that the Warning Label Proposal – which misplaces responsibility on some small business operators, creates an uneven playing field from a business perspective, produces a false sense of accomplishment in the fight against cardiovascular disease, and adds to consumer confusion – is the correct way to engage on this issue. The Board's focus should be on education around a total, balanced diet, and active lifestyle. Science and research continues to point to the need for broad-based solutions and a comprehensive approach to address chronic illnesses. The Board's novel Proposal to influence public health policy fails on its merits and as a matter of law.

Sincerely,



Joan Rector McGlockton
Vice President of Industry Affairs and Food Policy, National Restaurant Association