An amendment relating to the protection of the public health through the nutrition labeling of food; amending BOH R&R 07-01, Section 1, and BOH 5.10.005, BOH R&R 07-01, Section 2, and BOH 5.10.015 and BOH R&R 07-01, Section 3, and BOH 5.10.025 and adding new sections to BOH chapter 5.10; enacted pursuant to RCW 70.05.060, including the latest amendments or revisions thereto.

BE IT ADOPTED BY THE KING COUNTY BOARD OF HEALTH:

SECTION 1. Statements of Fact:

A. On July 19, 2007, the King County Board of Health adopted BOH R&R 07-01, a rule and regulation relating to the protection of public health through the nutrition labeling of food.

B. BOH R&R 07-01 takes effect August 1, 2008 and requires chain food establishments to provide nutrition information through labeling on menus and menu boards.
C. Several bills related to nutrition labeling in restaurants were introduced during the 2008 Regular Session of the Washington state legislature. House Bill 3160, addressing the availability of nutrition information, would have required chain food establishments to make nutrition information available upon request and would have made null and void BOH R&R 07-01. The bill also would have prohibited local boards of health statewide from adopting rules and regulations regarding menu labeling or nutrition information.

D. House Bill 3160 was amended by the house of representatives commerce and labor committee and adopted by the house of representatives as Engrossed Substitute House Bill 3160. After being amended by the senate government operations and elections committee, the bill was placed on second reading in the senate rules committee.

E. The chair of the house of representatives commerce and labor committee requested that representatives from King County and the Washington Restaurant Association lead an effort to negotiate an agreement among the parties in support of and in opposition to the bill.

F. The negotiations resulted in an agreement that was executed on March 8, 2008, among the chair of the King County Board of Health, the director and health officer of the Seattle-King County department of health and the Washington Restaurant Association.

G. In the agreement, the Washington Restaurant Association agrees to request that the state legislature not take action on Engrossed Substitute House Bill 3160 and agrees to not be a party to any lawsuit directed at King County regarding rules and
R&R

regulations established by the King County Board of Health on nutrition labeling in chain
food establishments.

H. In the agreement, the chair of the King County Board of Health commits to
holding a meeting before the end of the 2008 Regular Session of the Washington state
legislature to take action on amendments to BOH R&R 07-01 as negotiated with the
Washington Restaurant Association.

I. A special meeting of the King County Board of Health was held on March 12,
2008, in order to comply with the agreement. At the meeting, the Board of Health
adopted BOH R&R 08-01, making amendments to BOH R&R 07-01 as negotiated with
the Washington Restaurant Association.

J. The Board of Health adopted BOH R&R 08-01 as an emergency rule and
regulation in order to comply with the agreement and to avoid action by the state
legislature that would make null and void BOH R&R 07-01 or place a moratorium on its
enforcement.

K. Emergency rules and regulations of the Board of Health lapse after ninety
days.

L. By transmittal of this rule and regulation, the Seattle-King County department
of health fulfills its commitment in the agreement to propose for adoption by the Board of
Health under its regular rulemaking authority the amendments to BOH R&R 07-01 that
were adopted by the Board of Health in emergency rule and regulation BOH R&R 08-01.

M. In BOH R&R 08-01, the Board of Health indicated its intent to take action on
the provisions of the emergency rule and regulation BOH R&R 08-01 under its regular
rulemaking authority at its April 17, 2008 regular meeting. The Board of Health also
indicated its intent to consider any additional technical amendments negotiated by the
parties to the agreement.

SECTION 2. BOH R&R 07-01, Section 1, and BOH 5.10.005 are each hereby
amended to read as follows:

Chapter definitions. In addition to the definitions in BOH (Chapter 5.04, the
definitions in this section apply throughout this chapter unless the context clearly requires
otherwise.

A. "Chain ((food-establishment)) restaurant" means any one of at least ((ten)) fifteen
((food-establishments)) restaurants within the United States doing business under the same
name and collectively having at least one million dollars in gross annual sales and offering
for sale substantially the same menu items, regardless of whether the ((food-establishments))
restaurants are subject to the same ownership or type of ownership. "Restaurant" means a
food establishment at which any prepared, un-prepackaged foods are offered for sale and
consumption on or off the premises such as, for example, sit-down restaurants, cafes, coffee
stands, and fast-food outlets, but not grocery stores or movie theatres. For the purposes of
this chapter, "grocery store" means a store primarily engaged in the retail sale of canned
foods, dry goods, fresh fruits and vegetables, and fresh and prepared meats, fish, and
poultry, and includes convenience stores. "Chain restaurant" includes any chain restaurant
located within another business, regardless of whether the business within which it is located
is subject to this regulation.

B. "Condiment" means a sauce or seasoning including but not limited to ketchup,
mustard, hot sauce, tartar sauce and similar items offered for general use with or without
charge.
C. "Menu" means a printed list or pictorial display of a food item or items available for sale from a restaurant and includes menus distributed or provided outside of the restaurant for purposes of ordering. "Menu" does not include printed or pictorial materials for the purpose of marketing.

D. "Menu board" means any list or pictorial display of a food item or items posted in and visible within a restaurant or outside of a restaurant for the purpose of ordering. "Menu board" does not include printed or pictorial materials for the purpose of marketing.

E. "Point of ordering" means the location at a chain restaurant where consumers place their orders for menu items.

F. "Reasonable basis" or "reasonable bases" means any reliable and verifiable calorie and nutrient analysis of a standard menu item, which may include the use of calorie and nutrient databases, cookbooks, laboratory analyses and other reliable and verifiable methods of analysis.

G. "Standard menu item" means food offered for sale for more than ((sixty)) ninety days per year ((except for foods offered in a salad bar, buffet line, cafeteria service or similar self-serve arrangement, and condiments)) and includes only those items served in at least fifteen locations of a chain. "Standard menu item" does not include:

1. Food offered for sale identified only by one or more food tags. "Food tags" means labels or tags that identify any food item displayed for sale such as in a display case;

2. Unopened prepackaged foods;

3. Condiments;
4. Unique or location-specific food or meal items offered at fewer than fifteen locations of a chain;

5. Foods offered in a salad bar, buffet line, cafeteria service or similar self-serve arrangement. "Similar self-serve arrangement" means a food service location where consumers may themselves take foods from a counter, display case or hot or cold holding containers;

6. Foods served by weight or custom-ordered quantity;

7. Customized orders requested by consumers that change the standard menu item;

8. Garnishes, such as a slice of lemon or a sprig of parsley.

H. "Standard recipe" means a recipe or formula used in preparing a menu item or meal that is consistent from one restaurant to the next in a chain.

I. "Substantially the same menu items" means eighty percent or more of the menu items served in at least fifteen locations of a chain restaurant are the same and are prepared using a standard recipe. Beverages that are prepared on site using a chain's standard recipe are to be included as menu items for the purposes of calculating whether a chain restaurant meets the definition of serving substantially the same menu items. Other types of beverages are not included in this calculation.

SECTION 3. BOH R&R 07-01, Section 2, and BOH 5.10.015 are each hereby amended to read as follows:

Food nutrition labeling requirements.

A. Nutrition labeling of food required. Each chain restaurant shall make nutrition labeling of food available to consumers for all standard
menu items as required by this (section) chapter. The nutrition labeling of food shall include, but not be limited to, the total number of calories and nutrients as follows, per standard menu item, as usually prepared and offered for sale, including condiments routinely added to a menu item as part of a standard recipe:

1. Total number of calories;
2. (Total number of grams of trans fat;
3.)) Total number of grams of saturated fat;
4. ((4-)) 3. Total number of grams of carbohydrate; and
5. ((5-)) 4. Total number of milligrams of sodium.

B. Nutrition labeling of food on menus. Each chain (food establishment) restaurant that provides a menu shall provide the nutrition labeling of food required under subsection A, of this section next to each standard menu item on the menu. The nutrition labeling shall be easily readable, in a (size and) typeface similar to other information about each standard menu item, and in a font no less than nine point. The menu shall include, in a clear and conspicuous manner, the following statement: "The Dietary Guidelines for Americans recommend limiting saturated fat to 20 grams and sodium to 2,300 milligrams for a typical adult eating 2,000 calories daily. Recommended limits may be higher or lower depending upon daily calorie consumption." (Recommended limits for a 2,000-calorie daily diet are 20 grams of saturated fat and 2,300 milligrams of sodium." Each chain food establishment offering standard menu items containing artificial trans fat shall addend the statement to include: "Eating artificial trans fat increases risk of heart disease."
C. Nutrition labeling of food on menu boards. Each chain restaurant that uses a menu board shall post on the menu board the total number of calories per standard menu item. The nutrition labeling shall be in a font size and typeface that is at least as prominent as that used to post prices of menu items on the menu board (similar to other information on the menu board about the item). This type of chain restaurant shall make the other nutrition labeling of food required under subsection A. of this section and the statement under subsection B. of this section available on easily readable printed (menus, pamphlets, brochures, posters or similar documents that are plainly visible to consumers at the point of ordering.

D. Other methods of providing nutrition information. In lieu of the placement requirements for nutrition labeling in subsections B. and C. of this section, a chain restaurant may provide nutrition labeling through an approved alternative or approved substantially equivalent method as described in section 4 or section 5 of this regulation.

E. Additional nutrition labeling of food permitted. Nothing in this section precludes restaurants from providing additional nutrition labeling of food voluntarily.

(E. Substantially equivalent methods of providing notice to consumers of nutrition information. The health officer may allow chain food establishments to provide nutrition labeling of food in a format that, in the discretion of the health officer, provides substantially equivalent notice to consumers, at the point of ordering, of nutrition information as is required by subsections B or C of this section.)

F. Standards for calorie and nutrient analysis. Chain restaurants shall perform or obtain the required calorie and nutrient analysis using
reasonable bases (including nutrient data bases, cookbooks, or other analyses that assure the accuracy of the nutrition labeling)). Calorie and nutrient analysis using reasonable bases is required once per standard food item, provided that portion size is reasonably consistent and the restaurant follows a standard recipe and trains to a consistent method of preparation. Chain (food establishment) restaurant owners or operators shall provide to the health officer, if requested, (information documenting the accuracy of the nutrition labeling provided to consumers)) documentation of the reasonable bases of calorie and nutrient analysis for purposes of enforcement of this regulation. (A nutrition label shall be deemed out of compliance with this section if it bears, for calories or any nutrient for which labeling is required under subsection A of this section, a total number value that is more than twenty percent lower or higher than nutrient analysis shows as the content of the menu item.)

G. Disclaimer for nutrition content variation. The nutrition labeling of food required under subsection A. of this section may be presented with a disclaimer stating that there may be variations in nutrition content across servings, based on slight variations in overall serving size or quantity of ingredients, or based on special ordering.

H. Identification of chain restaurant status. Each food establishment shall identify whether or not it is a chain restaurant by a method approved by the health officer.

NEW SECTION. SECTION 4. There is hereby added to BOH chapter 5.10 a new section to read as follows:

Approved alternative methods of nutrition labeling.

A. Approved alternative methods of nutrition labeling for chain restaurants that provide menus. A chain restaurant that provides a menu may provide nutrition labeling
through one of the approved alternative methods listed in this subsection in lieu of the placement requirements in BOH 5.10.015.B., but only if a statement clearly and prominently appears on each page of the menu stating the location and specific method through which nutrition information is available and only if the alternative method of nutrition labeling is available at each point of ordering.

1. Approved alternative methods for nutrition labeling on the menu are:

a. a menu insert. A menu insert shall be placed within each menu or shall be presented by the server with the menu. A menu insert shall provide the nutrition information required by this chapter next to each standard menu item. The nutrition information shall be easily readable and in a font no less than nine point. A menu insert shall list food categories and food items in the same order as these appear on the menu. A menu insert is not required to contain photos or menu item descriptions that appear on the menu;

b. a menu appendix. A menu appendix shall be attached in the back of the menu. A menu appendix shall provide the nutrition information required by this chapter next to each standard menu item. The nutrition information shall be easily readable and in a font no less than nine point. A menu appendix shall list food categories and food items in the same order as these appear on the menu. A menu appendix is not required to contain photos or menu item descriptions that appear on the menu;

c. a supplemental menu. A supplemental menu similar in general appearance to the menu shall be available at each point of ordering or shall be presented by the server with the menu. A supplemental menu shall provide the nutrition information required by this chapter next to each standard menu item. The nutrition labeling shall be easily
A supplemental menu shall list food categories and food items in the same order as these appear on the menu. A supplemental menu is not required to contain photos or menu item descriptions that appear on the menu; and

d. electronic kiosks. An electronic kiosk shall be available at each point of ordering. An electronic kiosk shall provide the nutrition information required by this chapter for each standard menu item. The nutrition labeling shall be easily readable and shall be presented in a manner such that consumers can easily view in one place and compare nutrition information for similar menu items. An electronic kiosk shall present food categories and food items in the same order as they appear on the menu.

2. Each of the approved alternative methods for nutrition labeling on the menu shall include, in a clear and conspicuous manner, the following statement: "The Dietary Guidelines for Americans recommend limiting saturated fat to 20 grams and sodium to 2,300 milligrams for a typical adult eating 2,000 calories daily. Recommended limits may be higher or lower depending upon daily calorie consumption."

3. A chain restaurant that provides a menu and uses an approved alternative method for nutrition labeling on the menu shall also provide consumers in the restaurant who are ordering menu items for carryout with access to nutrition labeling that is equivalent to that provided for all other consumers.

B. Approved alternative methods of nutrition labeling for chain restaurants that use menu boards. A chain restaurant that uses a menu board may provide nutrition labeling through one of the approved alternative methods listed in this subsection in lieu of the placement requirements in BOH 5.10.015.C.
1. Approved alternative methods for labeling of calories. A chain restaurant may use one of the following approved alternative methods in lieu of posting calorie information on menu boards, but only if the chain restaurant provides the other nutrition labeling in accordance with the provisions for nutrient labeling in this chapter.

   a. a sign adjacent to the menu board. A sign adjacent to the menu board shall appear on the same wall as the menu board and shall be in the same field of vision as the menu board viewed by consumers at the point of ordering. A sign adjacent to the menu board shall provide the calorie labeling required by this chapter next to each standard menu item. The calorie labeling shall be in a font size and typeface that is at least as prominent as that used to post prices of menu items on the menu board. A sign adjacent to the menu board shall be easily readable and shall list food categories and food items in the same order as these appear on the menu board; and

   b. a sign in queue at eye level. A sign in queue at eye level shall be no less than two feet by three feet, shall be posted with the bottom of the sign no lower than four feet and the top of the sign no higher than eight feet from the ground, and shall be in clear view to consumers in queue, whether standing or in a drive-through, at or before the point of ordering. A sign in queue shall provide the calorie labeling required by this chapter next to each standard menu item. A sign in queue shall be easily readable, in a typeface similar to the menu board, and in a font no less than forty point.

2. Approved alternative method for providing nutrition information other than calories to consumers in a drive-through. A chain restaurant may provide the other nutrition labeling to consumers in queue in a drive-through at the first window of the drive-through or at another location where it is easily accessible to drive-through
consumers in lieu of the requirement in BOH 5.10.015.C. that it be plainly visible to consumers at the point of ordering, but only if the chain restaurant provides calorie labeling to consumers in a drive-through in accordance with the provisions for calorie labeling in this chapter.

C. Other approved alternative methods of nutrition labeling.

1. Approved alternative method of nutrition labeling for alcoholic beverages.

An approved alternative method for nutrition labeling of each alcoholic beverage is to collectively label alcoholic beverages in a clear and prominent position using the average nutritional values for beers, wines and spirits. Nutrition labeling of alcoholic beverages collectively shall otherwise be in accordance with the provisions for calorie and nutrient labeling in this chapter.

a. Chain restaurants that collectively label alcoholic beverages shall use the following average nutritional values:

(1) wine – 5 ounces: 122 calories; 4 grams carbohydrate; 7 milligrams sodium;

(2) regular beer – 12 ounces: 153 calories; 13 grams carbohydrate; 14 milligrams sodium;

(3) light beer – 12 ounces: 103 calories; 6 grams carbohydrate; 14 milligrams sodium; and

(4) distilled spirits (80 proof gin, rum, vodka, or whiskey) – 1.5 ounces: 96 calories.
b. Chain restaurants that collectively label alcoholic beverages may add to the nutrition labeling the following statement: "Signature drinks or liqueurs with added ingredients may increase caloric content."

2. Approved alternative method of nutrition labeling for combination meals that are posted on a menu board. A combination meal means a standard menu item that is comprised of two or more food items with options of food items. Chain restaurants may use the following approved alternative method of nutrition labeling for combination meals that are posted on a menu board. An approved alternative method for nutrition labeling of calories and nutrient values for each possible combination of food items offered in a combination meal is to provide calorie labeling for a combination meal that uses a range of the lowest and highest values of calorie content among all possible combinations of food items offered in a combination meal. Labeling of other nutrient values for combination meals is not required, but only if nutrition labeling is provided for the individual food items that comprise a combination meal. Nutrition labeling using calorie ranges shall otherwise be in accordance with the provisions for calorie labeling in this chapter.

NEW SECTION. SECTION 5. There is hereby added to BOH chapter 5.10 a new section to read as follows:

Approval process for proposed substantially equivalent methods of nutrition labeling.

A. A chain restaurant may propose a method of nutrition labeling not otherwise identified in BOH chapter 5.10 for approval by the health officer as a substantially equivalent method for use in lieu of requirements in BOH 5.10.015.B or C. A chain
restaurant shall obtain approval from the health officer of any proposed substantially equivalent method for nutrition labeling before implementation.

B. A chain restaurant shall seek approval of a proposed substantially equivalent method by submitting a written proposal to the health officer that demonstrates how the proposed method is expected to allow for consumers at the point of ordering to:

1. Perceive that nutrition information is readily available;

2. Encounter nutrition information routinely and automatically; and

3. Access nutrition information in a manner that does not interrupt the normal flow of business.

C. The written proposal shall include documentation of at least one of the following:

1. Sample nutrition labeling materials or other documents such as photographs that demonstrate that the form in which nutrition information would be provided to consumers is substantially equivalent to BOH 5.10.015.B. or C.

2. Existing data and other evidence from customer surveys that demonstrate that the proposed nutrition labeling method results in a percentage of consumers who see nutrition information before placing their order that is equal to or higher than the percentage in the menu labeling equivalency benchmark established in accordance with this subsection.

   a. Customer surveys used to support a proposed substantially equivalent method must be conducted independently by professionals using scientifically valid survey methods, including the use of random sampling methods to conduct customer assessments.
b. Pending the results of menu labeling research, the health officer establishes a preliminary menu labeling equivalency benchmark as seventy-five percent of consumers see nutrition information in the chain restaurant before placing their orders. The health officer shall collaborate with the restaurant industry in revising the preliminary benchmark based on scientifically valid menu labeling research.

3. A plan for evaluation of the proposed method and timeline for the submittal to the health officer of the data and other results of the evaluation. The evaluation plan shall be based on scientifically valid customer surveys that meet the requirements of subsection C.2.a. of this section.

D. The health officer may request that additional information be submitted before a proposal is considered for approval.

E. The health officer may approve a substantially equivalent method conditional on changes to the proposed method.

F. The health officer may limit approval of a substantially equivalent method to use in one chain and for a limited time.

G. Where an approved method may be applicable to several chain restaurants, the health officer shall propose these methods to the Board of Health for inclusion in this regulation as approved substantially equivalent methods of nutrition labeling.

H. Any changes in form to an approved substantially equivalent method require submittal of a new written proposal and approval by the health officer before implementation.

SECTION 6. BOH R&R 07-01, Section 3, and BOH 5.10.025 are each hereby amended to read as follows:
Enforcement – Nutrition labeling.

A. The director of the Seattle-King County department of public health or his or her authorized representative is authorized to enforce the nutrition labeling requirements of this chapter in accordance with the food establishment inspection and other enforcement provisions of BOH chapters 5.02 and 5.60 ((of this title)).

B. If the health officer questions the accuracy of nutrition labeling for a menu item, the health officer may refer a nutrition professional from the Seattle-King County department of public health to the restaurant to review and determine if the nutrition information requires correcting. The health officer shall verify any required corrections at the next regular inspection.

C. From August 1, 2008, through December 31, 2008, a chain restaurant shall not be deemed to be in violation of BOH 5.10.015.B. and C. if the restaurant provides documentation that it has taken steps to obtain calorie and nutrient analysis of standard menu items and create nutrition labeling.

D. From August 1, 2008, through August 1, 2009, a chain restaurant shall not be deemed to be in violation of BOH 5.10.015.B. and C. as it applies to drive-through menu boards.

SECTION 7. The King County Board of Health intends to encourage the county and cities and towns in the county to review and streamline, where appropriate, their permitting requirements, including costs, that could apply to signage needed for the purposes of complying with this regulation.
SECTION 8. If any provision of this regulation or its application to any person or circumstance is held invalid, the remainder of the regulation or the application of the provision to other persons or circumstances is not affected.

SECTION 9. Sections 2 through 6 of this regulation take effect August 1, 2008.

R&R was introduced on 4/17/2008 and passed by the Board of Health on 4/17/2008, by the following vote:

Yes: 10 - Mr. Ferguson, Ms. Lambert, Ms. Patterson, Mr. von Reichbauer, Mr. Dunn, Ms. Clark, Mr. Sherman, Mr. Hutchinson, Dr. Counts and Mr. Gossett
No: 0
Excused: 5 - Mr. Rasmussen, Ms. Frisinger, Dr. Nicola, Ms. Manning and Mr. Licata

BOARD OF HEALTH
KING COUNTY, WASHINGTON

[Signature]
Julia Patterson, Chair

ATTEST:

[Signature]
Anne Noris, Clerk of the Board

Attachments    None