Passing the 2010 Affordable Care Act (ACA) was a landmark event in health care policy. The ACA’s scope also went beyond health care. Included among myriad health insurance reforms and coverage expansions was Section 4205, a federal requirement for food-establishment chains with 20 or more locations to post calorie counts on menus. After 8 years of waiting, calorie labeling was finally implemented on May 7, 2018. How did this law come to be, and why did it take so long to go into effect?

The federal calorie-labeling law was the climax of rapid-fire state and municipal policy action that began in 2006 in New York City. When the 2010 law passed, calorie labeling had already been implemented in New York City (2008), Seattle (2009), and Philadelphia (2010). Several states had passed laws that had yet to be implemented, and others had proposed calorie-labeling legislation. These policies had differing labeling requirements and covered a variable number of retail chains. Recognizing the growing success of labeling laws — but also the variation from location to location that retailers had to contend with — the National Restaurant Association and other food-industry groups decided they would no longer oppose calorie labeling if a federal law could be passed that preempted state and local laws. \(^1\) Such preemption provided industry with a uniform labeling standard and supporters of calorie labeling with a guarantee that it would occur nationwide.

For food-labeling advocates, the victory may have been pyrrhic. When the federal rulemaking process began, the Food and Drug Administration (FDA) immediately operationalized the federal preemption in the law by calling on states and municipalities to halt any labeling plans that had not yet been implemented. Some states even went so far as to rescind their laws. Because the federal law required that a regulation be proposed within 1 year, these directives were considered benign. When it issued the proposed rule in 2011, the FDA outlined an aggressive timeline that would lead to full implementation within a year. But what happened next threw calorie labeling into a cycle of regulatory delays for 7 years (see timeline).

When the FDA considered defining “retail food establishments” broadly, movie theaters balked. Pizza, convenience-store, and grocery-store chains moved in next, leading the FDA to extend its timeline. \(^2\) After a long silence during federal elections, the Obama administration released the final rule in 2014, setting the compliance...
deadline for 2015. The rule was more far-reaching than anticipated, covering nearly all food retailers, including those that had most vigorously opposed labeling.

The progress was short-lived. The Obama and Trump administrations and Congress collectively added years of further delays. When faced with a lawsuit brought by the Center for Science in the Public Interest and the National Consumers League in 2017, the FDA agreed to stick with a final enforcement date of May 2018.3 Calorie labeling is now in effect, but the information’s position on menus is not entirely secure. Delays allowed opponents to lobby Congress, leading the U.S. House of Representatives to pass the Common Sense Nutrition Disclosure Act in February 2018. This bill, now under consideration by the Senate, would water down calorie labeling, allowing retailers more leeway on serving-size definitions and label placement and permitting take-out restaurants to avoid calorie posting.

The calorie-labeling saga demonstrates how preemption can slow down population health progress.4 It typically does so when the federal or a state government passes a weaker law that prevents stronger action at lower levels of government. In the case of calorie labeling, federal preemption blocked progress almost entirely by means of delay. The law had more robust requirements than most existing state and local laws, covering more types of establishments and requiring a message on menus regarding recommended daily calories. Because of the delays, however, many fewer consumers have been exposed to labeling over the past 8 years than would have been if states and municipalities had moved forward with their regulations, even temporarily, as federal rulemaking proceeded. The food industry used federal preemption to delay implementation as long as possible. Several industry groups even successfully challenged New York City’s attempt in 2017 to expand its local policy to include the new federal provisions, even though doing so resulted in a delay of only 1 year.

The calorie-labeling experience also exposed a broken regulatory system that is often unaccountable to the public. Some regulations are implemented promptly, in accordance with legislative timelines. The ACA’s insurance reforms and coverage expansions were the hallmark achievements of the Obama administration, and most provisions were enforced as planned. Despite the law’s clearly articulated timeline for enforcement, calorie labeling was more sensitive to industry lobbying because it was a lower priority. If the process of federal rulemaking were more transparent, with updates provided regularly, such post hoc haggling might be avoided. If, after a bill
was passed, advocates lobbied and educated federal agencies throughout the regulatory process, those agencies could be held accountable. Under more pressure, perhaps the Obama administration would have rolled out regulations on time or required labeling earlier for retailers, such as restaurants, whose path toward compliance was clear. The FDA did succeed in timely implementation of the ACA’s labeling requirements for vending machines. When the federal government fails to meet deadlines, legal remedies may be necessary, as demonstrated by the recent court challenge that compelled the FDA to finally implement calorie labeling.3

The delay has not been a complete loss for labeling advocates. Undermining claims that implementation would be burdensome, many food retailers voluntarily introduced calorie labels before they were required to do so. From Walmart and Kroger to McDonald’s and Pizza Hut, many chains—including some pizza, convenience-store, and grocery-store chains—began posting calories in 2017 or even earlier. The FDA has provided repeated guidance and flexibility to accommodate industry concerns. The delays and pending legislation, however, have introduced uncertainty. As they wait for Congress to water down the requirements, some chains may flout the law, which has weak enforcement provisions. Several chains put calorie information on their menus and then removed it after the last-minute delay in 2017.

Calorie labeling alone won’t change the course of the obesity epidemic, and research, especially in real-world settings, has shown that consumers may not reduce their caloric intake much in response.4 But other changes may follow, setting the stage for success. Food retailers may reduce the calorie content of their highest-calorie items. The concept of calories may enter the public consciousness in a way that promotes better understanding. Consumers may respond to calorie counts posted in supermarkets and convenience stores, where the effects have not been adequately studied.

Calorie labeling is necessary though not sufficient for obesity prevention, which may be achievable by pursuing a track similar to that of public education on cigarettes. The Surgeon General’s warnings on cigarettes appeared in the 1960s, followed by advertising restrictions and limitations on smoking in public buildings. Only several decades later have U.S. smoking rates declined, probably prompted by more aggressive smoking restrictions imposed primarily by states and municipalities. Obesity is not the same as smoking, but calorie labeling may be the beginning of a lengthy process that could help improve the diet quality and weight of Americans.

The experience of calorie labeling is a cautionary tale for future policies on obesity prevention. It may seem easier to implement some of this policy through federal action than at the state and local levels. But this debacle offers a lesson to advocates looking for a quick federal solution: be careful what you wish for.

Disclosure forms provided by the author are available at NEJM.org.

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This article was published on May 23, 2018, at NEJM.org.


DOI: 10.1056/NEJMep1802953
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