

**Washington Legal Foundation  
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July 23, 2012

New York City Department of Health and Mental Hygiene  
Board of Health  
Office of the Secretary to the Board  
Attn: Rena Bryant  
2 Gotham Center, 14<sup>th</sup> Floor, Room 14-15, Box 31  
Long Island City, NY 11101-4132

Re: Comments on the Proposed Amendment of Article 81 (Food Preparation and Food Establishments) of the New York City Health Code, found in Title 24 of the Rules of the City of New York

Dear Ms. Bryant:

The Washington Legal Foundation (WLF) welcomes the opportunity to offer its views on the Proposed Amendment of Article 81 regarding the maximum size of sugary drinks and self-service beverage cups sold and offered in food service establishments. WLF shares the New York City Department of Health and Mental Hygiene's (DOHMH) concern regarding the risk factors associated with obesity and the increase in obesity levels in the United States. WLF appreciates the efforts of DOHMH and the Board of Health in considering options to reduce the level of obesity among New Yorkers. Although WLF commends DOHMH and the Board of Health for its initiative in seeking ways to reduce the obesity levels of the citizens of New York City, we have serious concerns about the proposed amendments.

WLF urges the Board of Health to carefully contemplate the economic and social impact of such an amendment on the citizens and businesses of, and visitors to, New York City. The proposed amendment will negatively impact consumers in New York City by reducing available drink size options and by requiring them to purchase multiple drinks to achieve the same quantities larger than 16 ounces that are available in New York City today.

Furthermore, the proposed amendment is certain to adversely impact businesses that are regulated by the New York State Department of Health (NYSDOH). Such businesses will be forced to comply with the proposed amendment. Competitors such as convenience stores and grocery stores that are regulated by the New York State Department of Agriculture and Markets

(NYSDOA) and that sell the same beverages included in the proposed amendment will be free to continue to sell the prohibited products.<sup>1</sup>

In addition to the adverse economic impacts that will likely result from the proposed amendment, there are substantial public policy factors such as consumer choice and individual liberty that should be carefully weighed. Furthermore, the Board of Health should carefully review all available scientific data regarding the correlation between “sugary drinks” and obesity to determine whether there is credible scientific evidence that the proposed amendment will achieve the stated goal of reducing obesity. The Board of Health should also consider whether the desired results can even be effectively tracked and measured.

Because there are important economic and social concerns in addition to health concerns, WLF questions whether the Board of Health has the authority under New York law to pass such a resolution without the assistance of the democratically-elected legislative body. WLF believes that under the important separation of powers provisions of New York law, New York City’s legislative body, not the Board of Health, is best positioned to consider, weigh, and determine various options to address obesity, including any proposed legislation.

WLF encourages DOHMH and the Board of Health to consider whether the proposed amendment is a rational way to achieve the stated goal of reducing obesity among New York City residents since: (a) not all establishments that provide self-service “sugary” drinks in cups or containers larger than 16 ounces are included in the Proposed Ban; (b) consumers will have the option to purchase two drinks to equal more than 16 ounces; (c) consumers may still receive refills in an amount greater than 16 ounces; (d) consumers may purchase beverages with similar sugar content (such as milkshakes and alcohol) that are not included in the amendment; and (e) consumers may still add any amount of sugar or other sweetener they desire.

WLF shares the Board of Health’s goal of drawing attention to and addressing the problem of obesity. WLF, however, believes that New York City can implement various ideas and programs that will more effectively reduce the obesity level of New Yorkers and that do so in a less intrusive and restrictive impact on consumers and businesses than the proposed amendment.

## **I. Interests of Washington Legal Foundation**

WLF is a national public interest law and policy center located in Washington, D.C. WLF regularly appears before federal and state courts and administrative agencies to preserve and defend free market principles, a limited and accountable government, and individual and

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<sup>1</sup> The Memorandum of Understanding (MOU) between the NYSDOH and the NYSDOA was amended and executed by the Agencies’ Commissioners effective September 20, 2010. Pursuant to the MOU, the NYSDOH is responsible for the “inspection and regulation of places where food is consumed on the premises or sold ready-to-eat for off-premises consumption including the site at which individual portions are provided” including, without limitation, restaurants, cafes, coffee shops, and cafeterias. The NYSDOA is responsible for the “inspection and regulation of places where food is processed or manufactured, food warehouses, wholesale food distributors and retail food stores” including, without limitation, food stores, convenience food plants, and delicatessens with food service less than 50% of annual sales.

business liberties. It devotes a substantial portion of its resources to defending the rights of individuals and businesses to go about their affairs without undue interference from government regulators.

WLF believes in individual freedom of choice and that paternalism towards adult consumers is rarely, if ever, warranted even when agencies such as DOHMH and the Board of Health desire to adopt resolutions for the noble intention of improving the health of its citizens. WLF urges governments--including municipal governments--to trust in the ability of consumers who receive truthful information to make decisions they believe are in their best interests. When adult consumers are provided truthful, health-related information and make decisions based on such information, individuals are accepting personal responsibility and society as a whole benefits. WLF suggests that the Board of Health respect the intelligence of its citizens to make the choices right for them when provided with truthful information.

## **II. Purposes of the Proposed Amendment**

DOHMH identified a number of important reasons to justify a ban on an adult's freedom to choose. The Statement of Basis and Purpose in the above-referenced Notice of Public Hearing (Notice of Public Hearing) stated that more than half of New York City adults (58%) are now overweight or obese and more than 20% of the City's public school children (K-8) are obese.

To address the obesity epidemic among New York City's residents, DOHMH proposes that the Board of Health amend Article 81 of the Health Code, related to the maximum size of sugary drinks<sup>2</sup> and self-service beverage cups sold and offered in "food service establishments."<sup>3</sup> According to the proposed amendment, "[a] food service establishment may not sell or offer to sell a sugary drink in a cup or container that is able to contain more than 16 fluid ounces" and "[a] food service establishment may not sell or provide to any customer a self-service cup or container that is able to contain more than 16 fluid ounces" (collectively, the "Proposed Ban").

According to the Notice of Public Hearing, "a food service establishment determined to have violated this section will be subject to a fine of no more than two hundred dollars for each violation and no more than one violation of this section may be cited at each inspection of a food service establishment."

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<sup>2</sup> In the proposed amendment, a "sugary drink" is defined as "a carbonated or non-carbonated beverage that: (A) is non-alcoholic; (B) is sweetened by the manufacturer or establishment with sugar or another caloric sweetener; (C) has greater than 25 calories per 8 fluid ounces of beverage; and (D) does not contain more than 50 percent of milk or milk substitute by volume as an ingredient."

<sup>3</sup> In Article 81 (Food Preparation and Food Establishments) of Title 24 Department of Health of the Official Rules of the City of New York a "food service establishment" is defined as "a place where food is provided for individual portion service directly to the consumer whether such food is provided free of charge or sold, whether consumption occurs on or off the premises or is provided from a pushcart, stand or vehicle."

[http://www.nyc.gov/html/doh/downloads/pdf/rats/article\\_81.pdf](http://www.nyc.gov/html/doh/downloads/pdf/rats/article_81.pdf) last visited on July 20, 2012.

### III. Separation of Powers

While WLF appreciates the role the Board of Health plays in improving the health of New Yorkers, we believe the board will likely exceed its administrative authority if it adopts the Proposed Ban. The Board of Health is granted broad powers pursuant to N.Y.C. Charter § 558(b), which provides that “[t]he board of health from time to time may add to and alter, amend or repeal any part of the health code, and may therein publish additional provisions for security of life and health in the city and confer additional powers on the department not inconsistent with the constitution, laws of this state or this charter.”

The separation of powers doctrine is clearly embodied in the New York State Constitution where it mandates that the “legislative power of this State shall be vested in the Senate and the Assembly.” N.Y. Const., Art. III, § 1. Further, Section 21 of the New York City Charter provides that “[t]here shall be a council which shall be the legislative body of the city” and that the legislative power is vested with the council. N.Y.C. Charter § 21. Section 21 additionally provides that “[a]ny enumeration of powers in this charter shall not be held to limit the legislative power of the council, except as specifically provided in this charter.”

In addition to such separation of powers provisions, guidance provided in *Boreali v. Axelrod* regarding the delegation of authority between the Board of Health and the city council is relevant to the consideration of the Proposed Ban. See *Boreali v. Axelrod*, 71 N.Y.2d 1, 517 N.E.2d 1350 (1987). The regulations at issue in *Boreali* were invalidated because the public health council was found to have overstepped its bounds and exercised legislative authority in that it:

- (a) weighed “economic and social concerns” in addition to health concerns;
- (b) “wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance”;
- (c) “acted in an area in which the [New York] Legislature had repeatedly tried-and failed-to reach agreement in the face of substantial public debate”; and
- (d) did not exercise any special expertise or technical competence in the field of health in drafting the “simple code” at issue. *Boreali*, 71 N.Y.2d at 8-14, 517 N.E.2d at 1353-57.

Importantly, one federal court has relied on only one of the *Boreali* factors in striking down proposed regulations. *Nassau Bowling Proprietors Ass’n v. County of Nassau*, 965 F. Supp. 376, 379-380 (E.D.N.Y. 1977). The court found that the board considered factors other than health factors and stated that although the board had the authority to regulate health matters, it was “improper” to weigh and balance other “significant concerns not within the ambit of authority delegated to the Board.” *Nassau Bowling*, 965 F. Supp. at 380. Economic and social concerns should be evaluated in addition to health concerns to effectively analyze the impact of the Proposed Ban. As a result, the Board of Health will likely not be able to effectively create and implement such a ban without running afoul of the separation of powers limitations on its authority.

### **A. Weighing Economic and Social Concerns**

Like the regulations at issue in *Boreali*, the Proposed Ban on large sugary beverages obviously implicates important economic and social concerns. Such a ban will clearly have an adverse economic impact on those businesses that rely on the sale of such products, as well as the producers and distributors of such products. Vendors have a right to earn a living from the production and sale of legal products, especially when those products can be legally purchased in smaller sizes.

Furthermore, the Proposed Ban will negatively impact manufacturers, distributors, and retailers of the prohibited *cups and containers*. The Proposed Ban specifies that “[a] food service establishment may not sell or provide to any customer a self-service cup *or container that is able to contain more than 16 fluid ounces.*” (emphasis added) This definition is overinclusive because it arguably restricts the ability of coffee shops, cafes, and other NYSDOH-regulated establishments to sell, among other containers, coffee pots, thermoses, and tea pots that are “able to contain more than 16 fluid ounces.” Many retailers now rely on the significant revenues associated with the sales of such equipment, accessories, and drinkware. The resulting loss of sales is certain to adversely impact the revenues of such manufacturers, distributors, and retailers as well as the revenues of New York City.

Manufacturers, distributors, and retailers of self-service cups will also be adversely affected. Although there might be an increase in the purchase of 16-ounce and smaller cups and containers, there is certain to be a loss of sales of cups and containers that hold more than 16 ounces. Many retailers offer a discount to consumers who purchase a reusable cup and return to the retailer for refills, which also benefits the environment. Those consumers who have previously purchased larger reusable cups will now be forced to purchase a 16-ounce or smaller reusable cup.

Consumers will be further impacted by the Proposed Ban because they will have to purchase two smaller drinks to receive a drink larger than 16 ounces. This will increase a consumer’s total costs of purchasing self-service drinks. Moreover, consumers who purchase family meals that are available at some restaurants will no longer be able to receive the family-size (typically gallon) drinks that are usually offered.

The Proposed Ban may also reduce tourism in New York City. Given the state of the economy, families are more carefully considering total costs of holidays and vacations and some families may choose to visit cities other than New York City as they consider the possible increase in expenses associated with having to purchase more drinks.

The Proposed Ban will affect similarly-situated retailers and producers in an unfair fashion and likely put NYSDOH-regulated food establishments at a competitive disadvantage. Restaurants, coffee shops, and other food service establishments under the authority of NYSDOH will be affected by the Proposed Ban. Convenience stores, grocery store, and other businesses that sell self-service foods and beverages, however, are excluded from the Proposed

Ban because they are regulated by the NYSDOA, and will remain free to sell the drinks included in the Proposed Ban. Additionally, the Proposed Ban does not apply to dairy-based drinks or alcoholic beverages even though such drinks likely contain more sugar than soft drinks, thus having a disparate impact on producers of similar products.

As evidenced by the state constitution, social concerns should also be considered in weighing the impact of the Proposed Ban. New York has historically championed individual freedoms, and the New York State Constitution states that “[e]very citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right.” *N.Y. Const. art. 1, § 8*. Because of such guarantees, New York City will certainly want to consider the impact of the Proposed Ban on individual choice and liberty.

An individual’s freedom to exercise personal choice bolsters human dignity, responsibility, and fairness. Liberty underpins the American way of life and the U.S. Constitution--it is part of the American psyche. While WLF does not view the freedom to choose what one eats as a right equivalent to that of free speech, the freedom to choose what one eats has an immediate influence on both one’s mental and physical quality of life. Preparing, serving, and eating food has important cultural and religious dimensions. While some serious threats to public health necessitate minimal restrictions on personal liberty such as those threats associated with products that scientists agree are bad in any quantity, soda and other drinks included in the Proposed Ban are not such products. In light of the individual liberty at stake, the Proposed Ban and the associated restrictions are not justified.

Because the weighing of “economic and social concerns” is a legislative not administrative function, the Board will have exceeded its authority by enacting the Proposed Ban. Such concerns, as *Boreali* makes clear, are the exclusive purview of the New York City Council.

## **B. Writing on a Clean Slate and Encroaching on Legislative Responsibilities**

With regard to the second prong of the *Boreali* test, if the Board of Health passes the Proposed Ban it will not be “merely filling in the details of broad legislation describing the over-all policies to be implemented” but will rather be writing “on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance.” *Boreali*, 71 N.Y.2d at 13, 517 N.E.2d at 1356. Because there has been increasing focus on obesity and the methods that may be used to address such a society-wide health problem, the legislative body should be tasked with resolving such a difficult social, health, and economic problem by weighing and debating various options and costs. WLF agrees with the opinion in *Boreali* that “[m]anifestly, it is the province of the people’s elected representatives...to resolve difficult social problems by making choices among competing ends.” *Boreali*, 71 N.Y.2d at 13, 517 N.E.2d at 1356.

### **C. Exercising No Special Health Expertise**

Although obesity is certainly a health concern, it does not appear that any special expertise or technical competence in the field of health was exercised by the Board of Health in developing the details of the Proposed Ban. In light of the fact that drinks with sugar--such as alcohol and milkshakes--are not included in the proposal, that consumers may get multiple refills or purchase multiple drinks, and the implausibility of the Proposed Ban's ability to reduce obesity rates, it appears that the selection of drinks was not based on health and science but was instead arbitrary.

For the reasons discussed above, the New York City Council is the appropriate body to consider potential options to address the obesity issue in New York City. If the *Boreali* test is applied to the Proposed Ban, the Board of Health will likely be found to have exceeded its authority.

### **IV. Irrational Means to Reduce Obesity**

The Proposed Ban is not a rational way to reduce the obesity of New York City citizens. While the Proposed Ban may negatively affect sales to consumers, a consumer has the option to purchase two drinks to equal more than 16 ounces and, thereby, circumvent the Board of Health's goal. In addition, an establishment subject to the Proposed Ban may be located next to a NYSDOA-regulated establishment that is not subject to the Proposed Ban. It does not seem rational for a consumer to be prohibited from purchasing a 20-ounce sugary drink at Starbucks or Subway but walk potentially next door to a 7-Eleven or other NYSDOA-controlled establishment and purchase a similar 20-ounce drink. Nor does it make much sense to restrict the purchase of some sugary drinks while allowing the purchase of other sugary drinks such as milk-based products and alcohol in larger amounts.

The validity of the Proposed Ban hinges on its effectiveness, but various studies challenge the link between soda consumption and obesity, as well as the ability of bans or taxes to decrease consumption. Any product ban should be squarely rooted in science and likely to solve the problem being addressed.

First, soda consumption has steadily declined--sugar-sweetened beverages make up only 7% of the average person's caloric intake--while obesity has steadily increased. Just last year, Diet Coke became the second most popular carbonated beverage in the United States. This alone should call into question the hyperbolic characterizations of soda. Scientific studies further undermine the contention that soda is responsible for the obesity epidemic. A study in the *American Journal of Clinical Nutrition* found "no association between sugar-sweetened beverage consumption, juice consumption, and adolescent weight gain over a 5-year period."<sup>4</sup>

Even if it is scientifically determined that soda consumption is largely responsible for obesity, it is unclear that a ban on large portions of such drinks, which effectively acts as a tax on

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<sup>4</sup> Vanselow MS, Pereira MA, Neumark-Sztainer D, Raatz SK. Adolescent beverage habits and changes in weight over time: findings from Project EAT. *American Journal of Clinical Nutrition* 2009;90:1489-1495.

marginal consumption, will ameliorate the problem. A study by Van Hook and Altman found that children with access to junk food (e.g., soft drinks, candy bars, and potato chips) at school were no heavier than those without.<sup>5</sup> Furthermore, a 2010 study funded by the Robert Wood Johnson Foundation found that even a 40% soda tax had no statistically significant effect on the weight of those in the lowest income quartile.<sup>6</sup> Instructively, tax hikes on alcohol and tobacco have the largest effect on the consumption of light users, rather than heavy users.<sup>7</sup>

These results are unsurprising given the likely human response to soda bans: sweet-toothed individuals will find another sweet product to satisfy their sugar fix. As an article from the *American Journal of Preventative Medicine* stated, “taxes on soft drinks may reduce soda consumption but increase the consumption of other beverages high in sugar and calories.”<sup>8</sup> Not only may individuals turn to sugary substitutes in beverage form; restraint from soda consumption fosters the notion that “because they stopped drinking Coke, they are free to eat more cake.”<sup>9</sup> The *Journal of Public Economics* found that a six-calorie reduction in calories consumed from soda was accompanied by an eight-calorie increase in milk consumption, and a two-calorie increase in juice drink consumption for young people, age 3-18.<sup>10</sup>

Behavioral economics suggests that most obese individuals know they are heavy, understand the nutritional value of the foods they eat, and have strong incentives to correct their behavior.<sup>11</sup> Bans are unlikely to change this very human behavior unless most unhealthy options are banned.

Human behavior in tandem with the loopholes included in the Proposed Ban call into question the effectiveness of a large sugary beverage ban. Such factors will undermine the ability of the amendment to effectuate change in consumption or obesity rates. Because there is no reliable and credible evidence that the Proposed Ban will reduce obesity, there can be no justification for imposing restrictions on individual freedom of choice.

## V. Other Policy Considerations

The Proposed Ban, like all sin taxes, will act as a regressive tax that hurts the poorest segments of society the most. Poorer dietary habits tend to correlate to lower incomes, and thus taxes on “unhealthy” products tend to disproportionately affect lower-income households. Further, sin taxes are associated with other negative economic consequences. By design, for sin

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<sup>5</sup> Van Hook J, Altman CE. Competitive Food Sales in Schools and Childhood Obesity: A Longitudinal Study. *Sociology of Education* 2012;85(1):23-39.

<sup>6</sup> Finkelstein EA, Zhen C, Nonnemaker J, Todd JE. Impact of Targeted Beverage Taxes on Higher- and Lower-Income Households. *Archives of Internal Medicine* 2010;170(22):2028-2034.

<sup>7</sup> Marlow ML, Abdulkadirov S. Can Behavior Economics Combat Obesity? *Regulation Magazine* 2012; 14-18.

<sup>8</sup> Finkelstein E, French S, Variyam JN, Haines PS. Pros and cons of proposed interventions to promote healthy eating. *American Journal of Preventative Medicine* 2004; 27(3):163-171.

<sup>9</sup> Klick J, Helland EA. Slim Odds: Empirical studies provide little evidence that soda taxes would shrink Americans' waistlines. *Regulation Magazine* 2011; 20-23.

<sup>10</sup> Fletcher JM, Frisvold DE, Tefft N. The effects of soft drink taxes on child and adolescent consumption and weight outcomes. *Journal of Public Economics* 2010; 94:967-974.

<sup>11</sup> Marlow ML, Abdulkadirov S. Can Behavior Economics Combat Obesity? *Regulation Magazine* 2012; 14-18.



taxes to be effective they must decrease consumption of the targeted product. In doing so, sin taxes affect the jobs and livelihoods of those in the affected industries.

The threat to choice that the Proposed Ban presents seems minimal when considered in the context of just one product; but it sets a precedent with language that justifies bans on a panoply of other products that is dangerous. The reasons for banning large sugary beverages are indistinguishable from the reasons that would justify bans on alcohol, red meat, hot dogs, white bread, French fries, cookies, etc. All of these products are considered detrimental to one's health, and almost any product, with adequate misuse, could pose a health danger. There will be times, however, where reasonable people will disagree on the "badness" of a given food, and creating a precedent for food and beverage bans is especially dangerous where the link to obesity is suspect.

It has been reported that the Board of Health has already considered further bans on popcorn and milkshakes. It is easy to see how one ban can easily lead to another, and another, based on where disfavor lies at any given moment. It is foreseeable that an array of products will be taken from the shelves, and consumers' dietary choices will be heavily reduced. Eliminating disfavored products from consumers' selection of choices takes away from life's simple pleasures, such as a night out at the movies with family or friends, infrequent indulgences, or childhood associations with particular foods or beverages. Micro-managing the population's diet takes away from the joy of life.

## **VI. Less Intrusive, More Effective Means to Battle Obesity**

A free society benefits when individuals are empowered with the freedom to make educated choices. Alternative means are available to New York City that would enhance rather than stifle individual choice. Public education efforts enable individuals to make informed food and beverage choices while preserving that right to choose. Such measures are far more consistent with our nation's values than an out-right ban. Such educational efforts could take the form of healthy lifestyle campaigns in the media or in schools, and consist of fact-based information about the causes and dangers of obesity. Schools, who oversee the most vulnerable segment of the population, could increase health and physical education programs, and provide outreach to parents. Such measures are consistent with schools' grant of authority.

Alternatively, the municipal government can create opportunities for individuals to make healthy lifestyle choices. For instance, more parks would provide more opportunity for physical and recreational activity. More drinking fountains would provide fresh water as an alternative to sugary beverages. Bike share programs promote physical fitness while providing the added benefit of alternative modes of transportation. Many of these efforts will be community based, so as to suit the needs, qualities, and landscapes of the local population. These measures enable individuals to make healthy choices of their own volition and are better suited to solving the obesity epidemic than a one-size-fits-all approach.

New York City can incentivize all food and beverage outlets to provide healthier options for consumers. New York City can also incentivize its citizens to eat healthier and lose weight.

Comments on Proposed Amendment of Article 81  
July 23, 2012

Many reading programs implemented across the nation's libraries incentivize children to read during the summer months. Many times the best results are achieved with the proverbial carrot rather than the stick.

WLF applauds the Department of Health and the Board of Health for seeking to improve the health of New York City citizens. WLF appreciates the opportunity to provide the Board of Health our feedback and views on such an important topic. We encourage the board to carefully consider the negative economic, social, and behavioral impacts that are likely to result from the Proposed Ban.

WLF believes the Board of Health can positively impact the obesity levels of New Yorkers through less restrictive means such as education, exercise programs targeting at adults as well as children, facilities for such programs, and healthy school lunch options.

Respectfully submitted,

/s/ Lori L. Jenkins

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/s/ Anastasia P. Killian

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