

One Minute Memo®



Last Minute Challenge to FDA Menu Labeling Rules

By Robert Milligan and D. Joshua Salinas

A group of major grocers and retailers has recently petitioned the Food and Drug Administration (“FDA”) to stay and reconsider its new menu labeling rules. The FDA had previously finalized new menu labeling rules in connection with the Affordable Care Act to make calorie and nutrition information more available for consumers when dining out. After multiple extensions, the current compliance and enforcement date for the menu labeling rules is **May 5, 2017**.

The nationwide menu labeling rules were initially welcomed by the restaurant industry because the rules were expected to provide nationwide uniformity and harmony to the patchwork rise of various state and local laws and regulations regarding calorie and nutritional disclosures. The petitioner grocers and retailers argue, however, that the new menu labeling rules are overly broad and encompass too many businesses, do not properly clarify what constitutes a “menu,” and will cause significant costs for compliance.

With the compliance and enforcement date fast approaching, companies that are subject to the menu labeling rules should ensure their menu boards and menus comply with the new labeling rules regardless of the pending petition. Such companies should also ensure they have a reasonable basis for any nutrient content declarations and take reasonable steps to ensure that the method of preparation and amount of a standard menu item adheres to the factors on which nutrient values were determined. Indeed, these menu disclosure issues are already being closely followed by the plaintiff’s bar, who continue to file consumer class actions that allege misrepresentations of calorie and nutrition disclosures.

The following is a list of the key requirements under the new menu labeling rules:

1. Applies to all restaurants and similar retail food establishments nationwide with (a) 20 or more locations, (b) doing business under the same name, and (c) offering for sale substantially the same menu items (similar but separate rules have also been enacted for food sold from vending machines).
2. All menu boards must clearly and conspicuously contain the following two statements: (a) “2,000 calories a day is used for general nutrition advice, but calorie needs vary,” and “Additional written nutrition information available upon request.”
3. “Menu boards” subject to these disclosure requirements are defined as all primary writings from which the consumer makes his or her order sections (e.g., in-store menu boards, Internet menus, takeaway menus).
4. Calorie information must be clearly and conspicuously displayed next to the name or price of “standard menu

items” (i.e., routinely included on menu or offered, excluding condiments, daily specials, temporary menu items, custom order, and customary market test foods, and food offered for sale for less than a total of 60 days per calendar year or fewer than 90 consecutive days to test consumer acceptance), but no specific color, font size, or contrasting background is required.

5. Calorie information must be declared on signs adjacent to foods on display and self-serve foods (e.g. salad bars, buffets) that are standard menu items.
6. When a menu or menu board lists flavors or varieties for an entire individual variable menu item, the calories must typically be declared separately for each listed flavor or variety, or flavors and varieties may be grouped together as a single listing if they have the same calorie content.
7. If the menu or menu board does not list flavors or varieties, and only includes a general description of the variable menu item (e.g. , “soft drinks”), the calories must be declared for each option with a slash between the two calorie declarations where only two options are available (e.g., “150/200 calories”), or as a range where more than two options are available (e.g., “100-250 calories”).
8. The following written nutrition information must be available to consumers upon their request: total calories, calories from fat, total fat, saturated fat, trans fat, cholesterol, sodium, total carbohydrates, fiber, sugars, and protein.
9. Finally, “[w]hen a standard menu item, including a beverage, is listed on a menu or menu board by name with different sizes, or each size has its own price, each size would constitute a standard menu item rather than a different flavor, variety, or combination, and each standard menu item must include a calorie declaration.”
10. A covered establishment must have a reasonable basis for its nutrient content declarations and take reasonable steps to ensure that the method of preparation and amount of a standard menu item adheres to the factors on which nutrient values were determined.
11. Violations may result in enforcement actions for injunctive relief and criminal and civil penalties.

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