

One Minute Memo®



FDA Menu Labeling Rules to Unfreeze

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Certain restaurants, grocers, and other food establishments will soon be required to comply with the Food and Drug Administration's ("FDA") menu labeling rules. The FDA previously finalized menu labeling rules in connection with the Affordable Care Act to make calorie and nutritional information more available to consumers dining out. Last year, the FDA extended the compliance deadline to **May 7, 2018**.

The prior compliance extension was in response, in part, to a last minute petition by a group of major grocers and retailers who argued that the menu labeling rules were overly broad and encompassed too many businesses, did not properly clarify what constitutes a "menu," and were expected to cause significant costs for compliance.

In February 2018, the House passed the [Common Sense Nutrition Disclosure Act \(H.R. 772\)](#), which would ease compliance under the menu labeling rules. For example, food establishments that provide entrees in multiple varieties (e.g., bowls, sandwiches, or salads) would only need to disclose the calories per serving or based on how the item is commonly ordered. The bill would also remove any criminal penalties, preempt civil litigation and any state menu labeling laws, and allow violators 90 days to cure any noncompliance under the menu labeling rules. The bill would further allow food establishments whose customers primarily off-site (e.g., online) to make the required disclosures in a remote location only (e.g., online menu) and remove the requirement for additional on-site, written disclosures.

H.R. 772 still needs to pass the Senate, and it does not appear that any further extensions will be granted before the May 7, 2018, compliance deadline. Indeed, it appears the Trump administration has [no plans to intervene](#) with the rollout of the menu labeling rules.

With the compliance date fast approaching, companies that are subject to the menu labeling rules should ensure their menu boards and menus comply with the menu labeling rules. The following is a list of the key requirements under the 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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