

November 25, 2014

FDA Releases Final Menu Labeling Regulations

On November 25, the Food and Drug Administration (FDA) released the [final rule](#) implementing “Nutrition Labeling of Standard Menu Items at Chain Restaurants,” included as Sec. 4205 of the Affordable Care Act. FMI’s statement may be found [here](#). The rule will be published on December 1, 2014 in the Federal Register and will be effective **one-year** from that date. The rule does effectively regulate supermarkets as well as supercenters, general merchandise, convenience stores and other non-restaurant establishments under the menu labeling regulations and provides additional guidance on the scope of foods covered, what is considered a “standard menu item” and how calorie information may be displayed for foods that are covered under the rule.

Scope of Covered Establishments: Covered establishment is defined as a restaurant or similar retail food establishment that is a part of a chain with 20 or more locations, doing business under the same name (cooperatives and marketing alliances are not covered) and offering for sale substantially the same menu item. The new labeling requirements only apply to restaurants and similar retail food establishments that offer for sale restaurant-type food. However, there is no percentage threshold, so any establishment with 20 or more locations that sells “restaurant-type” food is regulated under the FDA menu labeling rule. FDA has defined “restaurant type-food” as food that is:

- (a) Usually eaten on the premises, while walking away, or soon after arriving at another location; and
- (b) Either:
 - a. Served in restaurants or other establishments in which food is served for immediate human consumption or which is sold for sale or use in such establishments; or
 - b. Processed and prepared primarily in a retail establishment, ready for human consumption, and offered for sale to consumers but not for immediate human consumption in such establishment and which is not offered for sale outside such establishment.

FDA has indicated that cut fruit and vegetables as well as items in the deli case would not be considered “restaurant-type food” because they are generally eaten over a period of time and often require further preparation. Foods that could be eaten over several eating occasions or stored for later use (e.g., loaves of bread, bags or boxes of dinner rolls, whole cakes, and bags or boxes of candy or cookies); foods sold by weight that are not self-serve and are not intended solely for individual consumption (e.g., deli salads sold by unit of weight such as potato salad, chicken salad), either pre-packed or packed upon consumer request; and foods that are usually further prepared before consuming (e.g., deli meats and cheeses) would similarly not be considered “restaurant-type food” and would not be covered under the rule.

Criteria for “Standard Menu Item”: Whether a food item is regulated under the menu labeling law also depends on whether FDA considers it a “standard menu item.” Standard menu item means a restaurant-type food that is routinely included on a menu or menu board or routinely offered as a self-service food or food on display. Seasonal menu items offered for sale as temporary menu items (appears on a menu or menu board for less than a total of 60 days per calendar year), daily specials and condiments for general use typically available on a counter or table are exempt from the labeling requirements.

Examples of Foods That Generally Would Be Considered Restaurant-Type Food	Examples of Foods That Generally Would Not Be Considered Restaurant-Type Food
<ul style="list-style-type: none"> • Food for immediate consumption at a sit-down or quick service restaurant • Food purchased at a drive-through establishment • Take-out and delivery pizza; hot pizza at grocery and convenience stores that is ready to eat; pizza slice from a movie theater • Hot buffet food, hot soup at a soup bar, and food from a salad bar • Foods ordered from a menu/menu board at a grocery store intended for individual consumption (e.g., soups, sandwiches, and salads) • Self-service foods and foods on display that are intended for individual consumption (e.g., sandwiches, wraps, and paninis at a deli counter; salads plated by the consumer at a salad bar; cookies from a mall cookie counter; bagels, donuts, rolls offered for individual sale) 	<ul style="list-style-type: none"> • Certain foods bought from bulk bins or cases (e.g., dried fruit, nuts) in grocery stores • Foods to be eaten over several eating occasions or stored for later use (e.g., loaves of bread, bags or boxes of dinner rolls, whole cakes, and bags or boxes of candy or cookies) • Foods that are usually further prepared before consuming (e.g., deli meats and cheeses) • Foods sold by weight that are not self-serve and are not intended solely for individual consumption (e.g., deli salads sold by unit of weight such as potato salad, chicken salad), either prepacked or packed upon consumer request

Summary

Establishments selling standard menu items for restaurant-type food or foods on display intended for immediate consumption will be required: (1) to disclose calorie information on menus and menu boards for standard menu items; (2) post a succinct statement concerning suggested daily caloric intake on menus and menu boards; and (3) post on menus and menu boards a statement

that written nutrition information is available upon request. Calorie information must be declared on signs adjacent to foods on display and self-serve foods that are standard menu items. There are also very prescriptive requirements related to the posting of calorie information and how information should be displayed depending on the serving size, etc.

FMI will continue reviewing the rule for more details and guidance for FMI members. We will be requesting a meeting with FDA and other Obama Administration officials regarding several aspects and outstanding concerns of the final menu labeling regulations.

As background, FDA released its Proposed Menu Labeling Regulations in April 2011 and sought to have the rule finalized and effective by July 2012. Since that time FMI submitted several detailed sets of comments to FDA and the Obama Administration regarding the extraordinary financial impact and associated operational complexities of menu labeling on the supermarket industry. Members of Congress, led by Rep. Jack Kingston (R-GA), Rep. Cathy McMorris-Rodgers (R-WA), Senator Roy Blunt (R-MO), Senator Angus King (I-ME), and Rep. Loretta Sanchez (D-CA) repeatedly urged FDA to not expand menu labeling to mainstream grocery stores.

We will continue to work with the bipartisan, bicameral co-sponsors of the Common Sense Nutrition Disclosure Act ([H.R. 1249/S. 1756](#)). We encourage you—and your store managers—to [contact](#) your Members of Congress to voice your concerns with FDA's menu labeling rule.