

FDA Menu Nutrition Labeling Requirements Will Mean Significant Changes for Chain Restaurants

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Efforts by the Food and Drug Administration (FDA) to implement the restaurant menu labeling and vending machine labeling provisions of the Patient Protection and Affordable Care Act of 2010 (Act) took a major step forward with the publication of the FDA's proposed regulations on April 6, 2011. As detailed in the November 30, 2010 and February 24, 2011 issues of *Franchise Alert*, the FDA previously issued a Draft Guidance for Industry detailing the requirements of the Act's menu labeling provisions (Guidance); however, in light of "extensive comments" from industry and the public, and given the importance of these rules, in January 2011, the FDA decided to withdraw that Draft Guidance and move to a full-fledged rulemaking process to ensure proper public participation.

Despite its effort to address concerns raised in response to the Guidance, the FDA's proposed rules still leave many questions unanswered, and franchisors and operators should pay special attention to the proposal and provide comments to the FDA to ensure that the final regulations are practical and appropriate. The FDA will accept comments through June 6, 2011.

Businesses and Establishments Affected

The Act imposes labeling and disclosure requirements upon any "restaurant or similar retail food establishment that is part of a chain" (a) with more than 20 locations (b) doing business under the same name and (c) offering for sale substantially the same menu items. The Rulemaking clarifies that an establishment must meet all three criteria to be subject to the requirements of the Act.

The Rule states that the FDA considers as restaurants any establishment whose primary business activity is the sale of "restaurant style" food to consumers. This definition includes businesses "similar" to restaurants that sell food directly to consumers that is intended to be consumed immediately, either on or off the premises, including self-service, carryout and delivery restaurants. In a change of direction from the Guidance, which interpreted these categories very broadly, the FDA has proposed that it will *not* apply these requirements to retailers for which food is an incidental business (such as movie theaters), and such establishments will not be required to post nutrition information. The "movie theater exception" is and remains controversial, especially

given that other businesses with seemingly "incidental" food service activities—for example, a convenience store sandwich counter or a bookstore coffee stand—are not exempt. This issue may be reconsidered in the final regulations and could even form the basis for a judicial challenge.

The FDA will consider as chain locations restaurants that are owned, controlled or operated by a single corporate entity, including those operated through franchise agreements. Slight name variations between locations or menu offerings will not exclude a restaurant from the definition. For example, "ABC" restaurant and "ABC Express" restaurant would be considered part of a chain if meeting the other requirements. Also, individual locations that offer items for sale that use the "same general recipe and are prepared in substantially the same way with substantially the same food components, even if the name of the menu item varies" will be considered chain restaurants.

Required Nutritional Information

The Act requires restaurants to make various disclosures regarding the nutrient content of each "standard menu item." The proposed regulations define a "standard menu item" as including any food item "routinely included in the primary writing of the restaurant . . . from which a consumer makes a food selection." Such a "primary writing" may be a written menu, posted menu board or other written communications. The FDA draws an interesting distinction for restaurants that provide takeout or delivery service. While menus mailed to consumers solely as advertising for conventional sit-down restaurants would not be required to include nutritional information, similarly mailed menus, menus on the Internet or menus hand delivered, from which a consumer can order food for delivery or takeaway *would* be required to disclose nutritional information.

Nonstandard restaurant offerings not normally listed on the menu, such as condiments, daily specials or custom orders, would not need to have nutrition information listed. Where a condiment is a standard part of the food item, its nutritional information would be required to be included in the total information disclosed for that item. For condiments available in a "salad bar" style and openly available to all customers (such as a ketchup dispenser), the proposed regulations would not require nutrition information to be disclosed.

On the menu itself, the restaurant must first state at the bottom of each page that the nutritional information is based on a 2,000-calorie diet. Each menu item must disclose the number of calories. Furthermore, the restaurant must make separately available more extensive written nutrition information for each menu item, including total calories from all sources, total calories from total fat, total fat, saturated fat, trans fat, cholesterol, sodium, total carbohydrates, sugars and protein contained in each serving size or other unit of measure.

The proposed regulations are a bit of a two-edged sword for franchisors. While they may avoid the need for a franchised chain to comply with multiple, conflicting local menu labeling requirements, the regulations will add a burden on the many chains not operating in the localities that previously required menu labeling.