

FDA Finalizes Chain Restaurant Menu Labeling Rules

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Introduction

It may surprise some to learn that the Affordable Care Act of 2010, a.k.a. "ObamaCare," among other things, amended the US Food, Drug and Cosmetic Act to require chain restaurants and similar retail food business to provide calorie and other nutritional information for menu items. The Food and Drug Administration (FDA) recently came out with "menu labeling rules" implementing this requirement.^[1] Restaurants subject to the menu labeling rules have one year to comply with their requirements; restaurants that are not subject to the rules may elect to be covered by the Federal requirements by registering every other year with the FDA.

Businesses Covered by the Menu Labeling Rules

A restaurant business is covered by the new menu labeling rules if it meets the following two criteria:

- First, the business must be a restaurant or similar retail food establishment as determined under the FDA rules (and referred to herein as a "restaurant"). Under the rule, this means a restaurant that offers "restaurant-type food" for sale - - i.e., foods eaten on the premises or for take-out (including delivery foods such as pizza), as opposed to grocery store foods that "that consumers often store for use at a later time or customarily further prepare." The scope of food businesses falling under the new rules is broad, including "convenience stores..., food service facilities located within entertainment venues (such as amusement parks, bowling alleys, and movie theatres), food service vendors (e.g., ice cream shops and mall cookie counters)... and grocery stores."
- Second, the restaurant must be "part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items."

Menu Items Subject to the Menu Labeling Rules

The new FDA menu labeling requirements apply to "standard menu items" offered by restaurants covered by the rules. "Standard menu items" refer to restaurant foods, as described above, which are normally included on a menu or menu board or offered as self-service foods or foods on display. There are exceptions to the labeling requirements for things such as condiments, daily specials, custom orders, and food products being test marketed. The requirements apply to alcohol

beverages except for alcohol on “display,” such as bottles of liquor behind the bar. Wineries have retained lobbyists to try to change this last requirement.[2]

The FDA’s New Menu Labeling Rules

The basic menu labeling rules (subject to specific exceptions, alternative options or additional requirements) for the food items covered by the new regulations are as follows:

- The menu must list, for each food item on the menu, the number of calories contained in such item. For multiple serving items (such as pizza served as a whole pizza pie or by the slice) the calories identified must be those calories within the product as it is usually prepared and offered for sale. The rules include additional requirements with respect to “variable menu items” - - foods such as pizza and ice cream which have individual toppings - and “combination meals” (e.g., a sandwich with a side salad or chips).
- The calories must be listed next to the name or the price of the menu item, in type size no smaller than that of the menu item, and be in the same color as, or a more conspicuous color than, that used for the menu item, and with the same or a greater contrasting background.
- The term “Calories” or “Cal” must be used: (1) as either a heading above a column for the number of calories for each menu item; or (2) as a reference adjacent to the calorie listing for each menu item.
- The calorie count must be calculated to the nearest five-calorie increment up to and including 50 calories and to the nearest ten-calorie increment above 50 calories (though amounts less than five calories may be expressed as zero calories).
- The menu must include the following statements, each displayed “prominently and in a clear and conspicuous manner:”
 - “2,000 calories a day is used for general nutrition advice, but calorie needs vary.”
 - “Additional nutrition information available upon request.”
- The restaurant must maintain on its premises, and make available to customers upon request, certain nutrition information for each menu item, as follows: (1) total calories (cal); (2) calories from fat; (3) total fat; (4) saturated fat; (5) trans fat; (6) cholesterol; (7) sodium; (8) total carbohydrate; (9) dietary fiber; (10) sugars; and (11) protein. This information may be provided within a “counter card, sign, poster, handout, booklet, loose leaf binder, or electronic device such as a computer, or in a menu, or in any other [similar] form.”

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The restaurant must provide to the FDA, within a reasonable period of time following request, information substantiating menu item nutrient values.

The FDA, in announcing the new menu labeling rules, noted that “[m]ore than two thirds of adults and about a third of children in the United States are overweight or obese,” and that. “[m]any people do not know, or underestimate, the calorie and nutrient content of these foods.” However, it is still unclear whether mandatory menu labeling requirements have any direct impact on obesity levels. Not surprisingly, given the apparent absence of such a linkage, along with the direct and indirect costs of compliance, the new menu labeling requirements are being greeted with varying degrees of enthusiasm, skepticism or disagreement.

For questions about the information contained in this advisory, please contact your usual Goulston & Storrs’ attorney or one of the attorneys listed below.

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[1] See Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and

Similar Retail Food Establishments, 79 FR 71155, <https://federalregister.gov/a/2014-27833> (December 1, 2014).

[2] Wine Lobby Fights FDA Calorie Count Mandates, Eater.com January 13, 2015, <http://www.eater.com/2015/1/13/7538081/wine-lobby-fights-fda-calorie-count-mandates> (on January 20, 2015)