

**American Bar Association
39th Annual Forum on Franchising**

MENU LABELING – “CHEESE FRIES FOR 700 CALORIES, PLEASE”

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**November 2-4, 2016
Miami, Florida**

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I. Introduction

For more than a decade, state regulators have made efforts to address the nation's obesity epidemic by making calorie and nutrition information more available to consumers through menu labeling legislation. As the various state and local menu labeling laws are triggered and applied differently, franchisors with locations in multiple jurisdictions have been required to track these laws and, if triggered, develop multiple approaches for disclosing nutrition information in accordance with each jurisdiction's distinct requirements.

The recent adoption of a federal menu labeling rule may actually reduce the burden on franchisors coming under its purview (or those voluntarily opting to comply), in so far as it will subject franchisors to a single, uniform and consistent federal standard across jurisdictions. Nevertheless, coming into compliance will require careful attention to detail and a comprehensive approach, especially for franchisors who must consider implementation at the franchisee level. An understanding of the federal menu labeling rule's mandates is crucial for all franchisors as they determine if their system is required to comply (or whether voluntarily opting to comply is prudent), and, if so, how to roll out a compliance strategy.

In this article, we begin with a brief discussion of the rationale behind menu labeling laws and a brief history of their passage at the state and local level. We then provide an overview of extant state regulations followed by a summary of the material aspects of the new federal menu labeling rule and its associated guidance. Finally, we provide franchisors with some important considerations and suggestions in preparing for initial implementation and ongoing compliance.

II. The Rationale Behind Menu Labeling

It's no secret that obesity is an American epidemic, one that costs our country approximately \$117 billion each year in health care and other related costs.¹ One of the primary risk factors for obesity is overconsumption of calories,² and calories consumed while eating at restaurants now constitute one-third of Americans' overall caloric intake.³ Studies have shown that most people are unaware, or at least underestimate, the calorie and nutrient content of the foods they eat at restaurants.⁴ For example, a restaurant-goer who is trying to make a healthy choice at Chili's may opt for a salad and forego a decadently described sirloin steak.⁵ This person's efforts would be frustrated by the fact that a salad at Chili's contains 1,270 calories (this varies depending on the salad chosen), while the sirloin steak has only 540 calories.⁶

This confusion – or, as it is sometimes referred to, “deception” – of the American restaurant-goer is one of the primary rationales behind menu labeling laws.⁷ When New York City proposed the nation's first menu labeling law in 2006, the City's Department of Health described how the “systematic underestimation of calories” indicates that consumers operate

¹ *Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, Purpose and Coverage of the Final Rule*, 79 Fed. Reg. 230 (December 1, 2014), 71156, at 71159.

² *Id.* at 71157.

³ Michelle I. Banker, *I Saw the Sign: The New Federal Menu-Labeling Law and Lessons from Local Experience*, 65 Food & Drug L.J. 901 (2010).

⁴ 79 Fed. Reg. 71161

⁵ Christine Cusick, *Menu-Labeling Laws: A Move from Local to National Regulation*, 51 Santa Clara L. Rev. 989, 990 (2011).

⁶ *Id.*

⁷ *Id.*

under “distorted perceptions of calorie content and *de facto* have been misled to view oversized, high-calorie portions as ‘normal’;” this accordingly hinders the public’s ability to adequately appreciate the health consequences of restaurant menu items.⁸ To provide clarity as to why menu labeling is the logical answer to the obesity “epidemic,” New York City explained:

There is a calorie information gap. This gap is contributing to people choosing higher calorie items and to the obesity epidemic. Providing information about the calorie content of foods and beverages being served in chain restaurants in a time, place, and manner that can inform decisions will help bridge this gap. Provision of calorie information on menu and menu boards is an important way to accomplish this goal.⁹

Advocacy groups, such as the Center for Science in the Public Interest, soon began campaigning to the federal government to extend the labeling requirements to restaurants.¹⁰ Activists’ principal argument in favor of uniform mandatory menu labeling was that it will encourage individuals to make healthier choices and consume fewer calories than they would if they remained uninformed of the nutrient content associated with their selections.¹¹ Proponents contended that requiring restaurants to display nutrition information would correct misperceptions about the nutrition of the food they order.¹² It was shown that consumers tend to erroneously associate certain terms, such as “chicken” or “grilled” with “healthy,” although oftentimes no such correlation to nutritional value exists.¹³

While these studies have emerged as the primary rationale for menu labeling laws, it is worth noting that at least some research has suggested that menu labeling may not actually result in the health conscious decisions it purports to influence. For example, studies in New York City and King County, Washington, two of the areas that have implemented state menu labeling regulations, concluded that “posting calorie information had little or no effect on total amount of calories persons consumed — especially in low-income areas where obesity rates may be higher than in more affluent areas.”¹⁴ Related exploration of the effect of menu labeling on consumer choices indicates that there may be no significant change in behavior because consumers ultimately tend to either (1) simply look past or ignore nutritional information, focusing on price and pictures, or (2) not understand what the provided nutritional information means in terms of health consequences or benefits.¹⁵ These studies were based largely on studies of pure calorie labeling, however, which has been criticized as insufficient when it is not supplemented by

⁸ Brent Bernell, *The History and Impact of the New York City Menu Labeling Law*, 65 Food & Drug L.J. 839, 843 (2010).

⁹ *Id.* (quoting N.Y. City Bd. Of Health, Notice of Intention to Repeal and Reenact § 81.50 of the New York City Health Code, at 7 (Oct. 2007), <http://nyc.gov/html/doh/downloads/pdf/public/notice-intention-hc-art81-50-1007.pdf>).

¹⁰ Banker, *supra* note 3, at 916.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ James G. Hodge, Jr., et. al., *Alternative Models to Supplement Menu Labeling*, 17 NEXUS 79, 88 (2011-2012). See also, Brian Elbel et al., *Calorie Labeling and Food Choices: A First Look at the Effects on Low-Income People in New York City*, 28 Health Affairs 1110 (2009), <http://content.healthaffairs.org/content/28/6/w1110.full>; see also Christina A. Roberto et al., *Evaluating the Impact of Menu Labeling on Food Choices and Intake*, 100 Am. J. of Pub. Health 312 (2010), <http://ajph.aphapublications.org/cgi/content/abstract/100/2/312>.

¹⁵ *Id.*

information related to recommended daily amounts, as well as how the particular food's calories are apportioned among the various food groups.

In addition to doubt as to their practical effect, policymakers in the United States have continuously struggled to determine the amount and type of regulation that is truly needed and is truly permissible to combat obesity and related health issues. The most frequently raised objections are based upon fundamental principles of constitutional law: the First Amendment and Equal Protection.

The First Amendment argument, advanced by restaurant owners and affiliates, highlights that the disclosure requirements violate their First Amendment right to free speech, as they arguably compel covered establishments to engage in specific speech by requiring certain information to be displayed on their menus.¹⁶ Restaurants have a number of objections to the disclosure of this information on boards and menus, and accordingly, argue that they are guaranteed the freedom from being forced to make this type of speech against their will. The case law that has developed over the history of menu labeling (at the state and federal level) has gone from assessing this type of "commercial speech" under a four-prong test¹⁷ that lines up somewhere between intermediate and strict scrutiny, to a rational-basis test,¹⁸ which examines whether there is rational basis for the regulation. Ultimately, the case law has settled on a standard that permits the disclosure requirements as factual and uncontroversial disclosure requirements rather than blatant prohibitions on speech¹⁹ This standard characterizes menu labeling as purely factual, and courts analyzing these regulations under it will typically find restaurants' rights protected so long as the disclosure requirements reasonably relate to the State's interest in preventing consumer deception.²⁰

The Equal Protection argument highlights the discrepancy involved in the rule's covering only larger chain restaurants, which could be seen as inappropriate discrimination under the Equal Protection Clause.²¹ Domino's Pizza raised this issue, noting that "[w]hat doesn't make sense is the notion that if you operate [twenty] units, it's more important to provide nutrition information to consumers than if you own less than [twenty units]."²² In light of the expenses involved in providing and updating menu listings, chain restaurants have found the law to be unfairly burdensome on them, while smaller chains and other restaurants are not subject to those same burdens.²³

Notwithstanding these and other concerns raised by legislative, industry, and related groups, the logic behind menu labeling has carried the day with government decision-makers.

¹⁶ Cusick, *supra* note 5, at 1007.

¹⁷ *Id.* at 1008 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.W.*, 447 U.S. 557, 561 (1980)) ("To determine if a regulation violates a plaintiff's right to commercial speech, the *Central Hudson* test considers (1) whether the regulated expression concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is more extensive than is necessary to advance that interest.").

¹⁸ *Id.*

¹⁹ *Id.* (citing *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 652 (1985)).

²⁰ *Id.* at 1008-09.

²¹ *Id.* at 1009 (Though the Equal Protection Clause typically applies to state laws, "[t]hrough the doctrine of reverse incorporation, the Supreme Court has found that [it] may apply to the federal government through the Due Process Clause of the Fifth Amendment.").

²² *Id.* at 1010 (citing Julie Jargon, *Menu Labeling Stirs Controversy*, Wall St. J., July 17, 2009, <http://online.wsj.com/article/SB124786160526159703.html>).

²³ *Id.*

There is persuasive value to the rhetoric that restaurant food is typically higher in calories, fat, sodium, and carbohydrates than food prepared at home, and Americans are eating out with increasing frequency.²⁴ Ultimately, those in favor of compulsory nutrition labels argue that they may encourage restaurants to adjust recipes or cooking methods to cut calories, to reduce portion sizes, or to offer new healthy alternatives.²⁵

III. Background/History of State Labeling Laws

The federal government has long regulated the safety of food and has required nutritional information to appear on packaged foods.²⁶ Yet the first move to impose menu labeling standards on the restaurant industry was enacted at the local level. Many will remember what then seemed like an audacious attempt by New York City, in 2006, to enact the first official regulation requiring a point of purchase provision of nutrition information. New York's law required that calorie information be shown on the menu in a font at least as prominent as name or price, and it applied to any restaurant operating in the city that was part of a chain of 15 or more retail establishments. The public was aghast: did we really want to know how many calories we were consuming? But New York City's law survived two court challenges, and was ultimately upheld as constitutional by the U.S. Court of Appeals for the Second Circuit in December 2009.²⁷ Soon, New York City residents became accustomed to the calorie information shown on their favorite chain food menus. Several years later, New York City's "Sugary drink" law met with considerably less success.²⁸

Other state and local governments soon followed suit in passing menu labeling laws. California, eager to maintain its health-conscious reputation, passed the first state-wide menu labeling law in September 2008, applying to restaurants with 20 or more locations.²⁹ However, as described in more detail below, California halted enforcement of its state menu labeling law pending finalization of the federal menu labeling law. Massachusetts, Maine, New Jersey, Oregon and Vermont have also passed state legislation, along with a number of other county and local municipalities (discussed in more detail in Section IV below).³⁰ Accordingly, franchisors with operations in one or more of the states or local jurisdictions with menu labeling laws in place have already been subject to these regulations and have taken steps to come into compliance. (See Appendix 1).

IV. State and Local Menu Labeling Laws

²⁴ *Id.* at 990.

²⁵ *Id.* at 1023.

²⁶ *Id.* at 992.

²⁷ *New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).

²⁸ See, Stephanie L. Russ, *Does This Law Make My Butt Look Big? A Survey of Health-Related and Food Labeling Laws Food Service Franchise Systems Should Know*, 33:2 FRANCHISE L.J. 217 (2013), citing *N.Y. Statewide Coal. Of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health & Mental Hygiene*, 2013 WL 1343607 at *20 (N.Y. Sup. Ct. Mar. 11, 2013), *aff'd* 970 N.Y.S.2d (N.Y. App. Div. 2013) (striking down the proposed sugary drink law upon finding that the proposed regulation was "arbitrary and capricious because it applies to some but not all food establishments in the city, it excludes other beverages that have significantly higher concentrations of sugar sweeteners and/or calories on specific grounds, and the loopholes inherent in the Rule").

²⁹ Center For Science In The Public Interest, *Nutrition Labeling In Chain Restaurants, State And Local Laws/Bills/Regulations: 2009-2010*, 1-2 (2010), http://cspinet.org/new/pdf/ml_bill_summaries_09.pdf.

³⁰ *State and Local Menu Labeling Policies*, CTR. SCI. PUB. INT. (Apr. 2011), http://cspinet.org/new/pdf/ml_map.pdf, archived at <http://perma.cc/TN7Q-DV8R>.

Before addressing the FDA Menu Labeling Rule in Section IV below, we provide a summary of each state and locality that, based on the authors' research, has passed a menu labeling law. What has always been true about the state and local labeling laws is that they each apply a bit differently. The provisions vary on a number of important fronts, including but not limited to: (1) the number of locations required to trigger the law in the first place; (2) the menu items covered (i.e., for how long they must appear on the menu to require labeling); (3) the size/appearance of the label; (4) whether fast-food displays or vending machines are covered; and, (5) whether the restaurant must supply supplemental nutritional information in addition to the basic calorie count. Because many restaurant and similar retail food establishment chains are located in a number of jurisdictions, they are subject to a number of different nutrition disclosure laws, requiring them to develop and track multiple approaches for disclosing nutrition information in order to meet each jurisdiction's requirements. Accordingly, the resulting potential compliance costs may be far greater under a state compliance strategy for a large chain than under a single uniform standard as imposed by the federal menu labeling laws.³¹

A. California

In 2008, California enacted Senate Bill 1420.³² That law imposed menu labeling requirements in California that were intended to be phased in over several years. In sum, California Senate Bill 1420 imposed statewide menu labeling requirements for restaurants with 20 or more locations in California. This law required that such restaurants disclose calorie and nutrition information for all standard menu items on menus, menu boards, and food display tags, in a fashion that would be clear and conspicuous. For items that are not appetizers or desserts, if such items were intended to serve more than one individual, then the number of individuals to be served was also required to be stated, as well as the calorie content per individual serving. However, information posting was not required for any item that appeared on the menu for less than 180 days, for alcoholic beverages (the labeling of which is not regulated by the US. Food & Drug Administration) or for self-service items at salad bars or buffet lines. For drive-thrus, a notice displaying: "NUTRITION INFORMATION AVAILABLE UPON REQUEST" was required and the requisite information was to be made available upon request.

However, as mentioned above, subsequent to California Senate Bill 1420, in late 2011, the menu labeling requirements of California Senate Bill 1420 were effectively repealed by California Senate Bill 20. Though the new bill did not literally repeal the prior law, it has been interpreted as having that effect. California Senate Bill 20 was approved by the Governor of California and became effective on January 1, 2012.³³ The statute that resulted now simply defers to the federal menu labeling requirements.³⁴ Therefore, California's previous regulations on menu labeling are not being enforced.

B. Maine

³¹ Office of Regulations, Policy, and Social Sciences, Center for Food Safety and Applied Nutrition, *Final Regulatory Impact Analysis: FDA-2011-F-0172, Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments* (2014) (<http://www.fda.gov/downloads/Food/IngredientsPackagingLabeling/LabelingNutrition/UCM423985.pdf>).

³² Cal. S.B. 1420 (2008) (hereinafter "S.B. 1420"). This law pre-empted all local actions in California on the matter of menu labeling, such as San Francisco Ordinance 40-08 (2008) and Santa Clara County Ordinance No NS-300.793 (2008).

³³ Cal. S.B. 20 (2011).

³⁴ Cal. Health & Safety Code, Section 114094 (2012).

Maine's menu labeling law³⁵ applies to "chain restaurants that are located in the State." However, the statute does not provide a specific definition of what constitutes a "chain restaurant." Nevertheless, under the statute, chain restaurants must state, in a clear and conspicuous manner, on a menu, menu board or food display tag, the total number of calories per serving of each food and beverage item listed for sale on the menu, menu board or food display tag.³⁶ Such information must be listed adjacent to or in close proximity to, and be clearly associated with, the applicable menu item. The calorie information must be printed in a font and format at least as prominent in size and appearance as the name or the price of the menu item to which it refers.³⁷ However, such information is not required to be posted for items that are served at self-service salad bars or buffets; items that are served less than 90 days per year; condiments or other items that are offered to customers free of charge; items sold in the manufacturer's original, sealed package that contain nutrition information as required by federal law; or, to custom-ordered food that does not appear on the food display menu, menu board or food display tag. There are also specific labeling requirements for alcoholic beverages.³⁸

In terms of the method required for calculation of the calorie information: the calculation must be based on a reliable analysis of the menu item using a recognized method, which may include the use of nutrient databases, laboratory testing, or other reliable methods of analysis. Furthermore, the calorie count must be rounded to the nearest 10 calories for calorie content values above 50 calories, and to the nearest 5 calories for calorie content values less than 50 calories. The statute specifies that the calculation of calorie content of each menu item only needs to be established once if the restaurant follows a standardized recipe, uses a consistent method of preparation, and maintains a reasonably consistent portion size.³⁹

Finally, the statute requires that following statement accompany the required nutrition information in a prominent location and in a clear and conspicuous manner: "To maintain a healthy weight, a typical adult should consume approximately 2,000 calories per day; however, individual calorie needs may vary."⁴⁰

C. Massachusetts

Massachusetts' menu labeling law⁴¹ applies to food establishments that are part of a group of at least 20 doing business in the state and that meet the following three criteria: (1) they are engaged in the business of preparing and selling food items for immediate human consumption; (2) they offer substantially the same menu items, using menus, menu boards, or food tags, and offer servings that have standard portion sizes and content; and, (3) they operate under common ownership or control, as franchised outlets of a parent business, or do business under the same name. Certain exceptions are listed in the statute, such as kitchens preparing food for students, clients, patients, etc.; retailers primarily selling fresh produce; caterers; and, certain other specified categories⁴² (none of which are conventionally considered restaurants).

The Massachusetts menu labeling law specifies that it does not apply to items that are listed on the menu, menu board or food tag for less than 30 days in a calendar year, nor does it

³⁵ 22 Me. Rev. Stat. Ann., Section 2500-A (2009).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ 150 Mass. Code Regs., Section 590.002 *et seq.* (2009).

⁴² *Id.*

apply to any self-service, packaged food that is in a manufacturer's original, sealed package and is required to have federal law nutrition labeling.⁴³

The Massachusetts statute provides that the total calorie information must be presented in a conspicuous place adjacent to or in close proximity to the other menu or menu board information for that menu item. Furthermore, the caloric content values disclosed must be based on a verifiable analysis of the menu item by a nutritionist or dietician who is licensed at a state or national level. Such analysis may include the use of nutrient databases, laboratory testing, or other reliable methods of analysis, and must be rounded to the nearest 10 calories for caloric content values above 50 calories, and to the nearest 5 calories for caloric content values under 50 calories.

Finally, the statute provides that food establishments may collectively label alcoholic beverages using the following: (1) 122 calories for 5 ounces of wine; (2) 153 calories for 12 ounces of regular beer; (3) 103 calories for 12 ounces of light beer; or, (4) 96 calories for 1.5 ounces of distilled spirits.⁴⁴ If the food establishment elects to use these amounts, then it must add the following statement to the labeling: "Signature drinks or liqueurs with added ingredients may increase calorie content."⁴⁵

D. New Jersey

New Jersey's menu labeling statute⁴⁶ applies to "retail food establishments," which are defined to mean fixed restaurants or any similar places that are part of a chain with 20 or more locations nationally and doing business either: (1) under the same trade name or under common ownership or control, or (2) as franchised outlets that prepare food to be eaten on the premises or picked up at a drive-thru window.⁴⁷ The statute requires retail food establishments to post, in a clear and conspicuous manner, the total number of calories for each food or beverage item on the menu and menu boards of the food establishment. The posting must be adjacent to or in close proximity to the applicable item.⁴⁸ Drive-thrus have similar stated requirements.

Specifically excluded from New Jersey's requirements are items that are not listed on a standard menu, such as condiments placed on a table or counter for general use; daily specials; temporary menu items on the menu for less than 60 days per year; customized orders; and, certain items from a self-serve salad bar or buffet.⁴⁹

With respect to alcoholic beverages (in retail food establishments where they are sold), the New Jersey law states that, as an alternative to listing calorie information for each individual alcoholic beverage, the retail food establishment may list the average caloric value for beers, wines, and spirits as established by the U.S. Department of Agriculture's National Nutrient Database for Standard Reference.⁵⁰ However, if the retail food establishment chooses this option,

⁴³ *Id.*, at Section 590.009(G).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ N.J. Stat. Ann., Section 26:3E-17 (2009).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* That database is publicly available at <https://ndb.nal.usda.gov/>.

then it must also include the following statement in the labeling: “Signature drinks or liqueurs with added ingredients may increase calorie content.”⁵¹

Any calorie content values disclosed must be based on a “verifiable analysis of the menu item.” This analysis may include the use of nutrient databases, laboratory testing, or other reliable methods of analysis, and must be rounded to the nearest 10 calories for calorie content values above 50 calories, and to the nearest 5 calories for calorie content values less than 50 calories.⁵²

E. Oregon

In Oregon, the state menu labeling law⁵³ applies to “chain restaurants” that: (1) operate 15 or more restaurants nationwide; (2) sell standardized menu items that constitute 80% or more of the menu items served in the restaurant and at least 14 other affiliated restaurants; and, (3) operate under a trade name or service mark which is identical or substantially similar to the trade name or service mark of the affiliated restaurants.⁵⁴

With respect to chain restaurants, the Oregon law requires that menus, menu boards, and food tags for items that are not self-service disclose, in a conspicuous place, the calorie count of each item. However, the law does not apply to items that are sold for less than 90 days per year. If an item is ordered off the menu or menu board, then the total calorie statement must be displayed in a conspicuous place near other menu or menu board information for that same menu item. If the menu or menu board lists prices, then the size and the typeface used for the total calorie statement must be the same as that used for the item’s price. If an item is self-service, then the calorie information must be placed where the food item is displayed. Menus, menu boards and food tags must also include, in a conspicuous place, the daily intake amounts of calories, saturated fat, and sodium recommended by the Oregon Health Authority. Finally, upon request, additional nutritional information must be provided, and a statement to that effect must be conspicuously placed.⁵⁵

With respect to alcoholic beverages, Oregon requires the following nutritional disclosures. Wine: 122 calories, 4 grams of carbohydrate, and 7 mg. of sodium for a 5-ounce serving; Beer (other than light beer): 153 calories, 13 grams of carbohydrate, and 14 mg. of sodium for a 12-ounce serving; Light beer: 103 calories, 6 grams of carbohydrate, and 14 mg. of sodium for a 12-ounce serving; and, Distilled spirits: 96 calories for a 1.5 ounce serving.⁵⁶

F. Vermont

The Vermont menu labeling statute⁵⁷ requires that restaurants and similar food establishments that are part of a chain with 20 or more locations doing business under the same name and that offer for sale substantially the same menu items disclose how many calories are in each standard menu item. Such disclosures must appear adjacent to the name of the menu

⁵¹ *Id.*

⁵² *Id.*

⁵³ Or. Rev. Stat. Ann., Sections 616.560, 616.570, 616.575 (2009).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at Section 616.575 (2009).

⁵⁷ 18 Vt. Stat. Ann., Section 4086 (2011).

item, on the menu or menu board. The menu or menu boards must also contain a succinct statement concerning suggested daily caloric intake.⁵⁸

The Vermont law does not apply to alcoholic beverages.⁵⁹ Furthermore, the law does not apply to convenience stores or grocery stores (except for separately owned food facilities that are located within groceries and to which the law otherwise would apply).⁶⁰

G. Counties and Local Municipalities

While the authors are aware of no one registry or database that tracks which of the hundreds of counties and municipalities in the United States have in place menu labeling laws or regulations, our research uncovered the following counties with menu labeling regulations as of July 2016: (1) King County, Washington; (2) Montgomery County, Maryland; (3) Westchester County, New York; (4) Albany County, New York; (5) Nassau County, New York; (6) Schenectady County, New York; (7) Suffolk County, New York; (8) Ulster County, New York; and, (9) Multnomah County (which includes the city of Portland), Oregon.⁶¹ Although the Metropolitan Board of Health in Nashville/Davidson County, Tennessee passed a measure in 2010 requiring menu labeling, that measure was retracted by the Tennessee state legislature in a state-level bill that was passed shortly thereafter, pending the promulgation of final federal rules under the federal menu labeling law.⁶²

At the municipal level, New York City's Health Department began requiring in July 2008 that restaurants with standard menu items make calorie information publicly available at the point of purchase by posting it on menus and menu boards where it can be seen by consumers when ordering⁶³, and the city of Philadelphia, Pennsylvania has added a section to its Health Code with menu labeling requirements for chain establishments.⁶⁴

As of July 2016, with the exception of California (as discussed above), none of the above-listed states or localities had repealed or amended its statute/regulation in relation to the federal menu labeling requirements, so for now, those state and local requirements remain relevant for franchisors.⁶⁵

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ (1) King Cty. Bd. Of Health Ch. 5.10, Sections 1-2 (2011); (2) Montgomery Cty. Bd. Of Health Reg., Section 15-15A (2010); (3) Westchester Cty. Sanitary Code, Section 533 (2010); (4) Albany Cty. Local Law B (2009); (5) Nassau Cty. Local Law No. 20 (2009); (6) Schenectady Cty. Codified Laws, Ch. 285, adopted by Local Law No. 2-2010 (2010); (7) Standards of Suffolk Cty. Dept. of Health Services for Admin. Of Sec. 760-1330.2 of Art. 13 of Suffolk Cty. Sanitary Code (2011); (8) Ulster Cty. Local Law No. 1 (2009); (9) Multnomah Cty. Health Dept., Order 08.114 (Chain Restaurant Nutrition Labeling Policy), adopted by Resolution 09-019 (2009).

⁶² Tennessee Senate Bill 1092 (2009) (withdrew the authority of the state's health departments from enacting menu-labeling laws and simultaneously pre-empted all state agency regulation in this area).

⁶³ N.Y. City Health Code, Section 81.50 (2006).

⁶⁴ Philadelphia City Code, Title 6 (Health Code), Section 6-308 (approved Nov. 19, 2008, effective Jan. 1, 2010).

⁶⁵ For another excellent discussion of state and local laws in this area, see Stephanie Russ's 2013 article in the Franchise Law Journal (*supra*, note 28) providing an overview of menu labeling requirements.

V. The FDA Menu Labeling Rule

The U.S. Federal Drug Administration's (the "FDA") menu labeling efforts have been many years in the making. At least three bills have been presented to Congress since 2003, but none made it past the committee stage. It was not until President Obama's Patient Protection and Affordable Care Act ("PPACA"), passed in 2010, that federal menu labeling laws were finally made a reality. Section 4205 of the PPACA amends the 1990 Nutrition Labeling and Education Act by extending nutrition labeling to restaurant food. Following passage of the PPACA, the FDA promulgated a series of rules regulating compliance with the PPACA.⁶⁶

Since 2010, the FDA has been engaged in a spirited dialogue with the industry regarding implementation of the federal law. In 2014, the FDA released the much anticipated menu labeling rule, giving covered establishments a compliance deadline of December 2015 (the "FDA Menu Labeling Rule"). The FDA Menu Labeling Rule seemed to leave more questions open than it provided answers. In recognition of the legitimate pushback, the FDA delayed compliance until December 2016. However, more time—without helpful responses to questions or guidance to address concerns—only incited more opposition. In March 2016, Dr. Susan Mayne, Director of the FDA's Center for Food Safety and Applied Nutrition, delayed enforcement until such date as one year after the FDA issued its final guidance. The FDA released its long-awaited final guidance in April 2016 (the "FDA Guidance"), and barring congressional action, plans to start enforcing the FDA Menu Labeling Rule in May 2017.⁶⁷

While the FDA intends to begin enforcement in May 2017, it is important to recognize that this target enforcement date hinges on the tacit approval and corresponding inaction by Congress. Due to a mounting concern that the FDA's Menu Labeling Law is impractical and unnecessarily expensive, on February 12, 2016, the House of Representatives passed H.R. 2017, the "Common Sense Nutrition Disclosure Act," which is intended to give restaurants and retailers more flexibility to comply with the FDA Menu Labeling Rule. Specifically, this bill "would direct the Secretary of Health and Human Services to issue new rules to allow a food establishment to post nutritional information exclusively on its website if the majority of its orders are placed online, would clarify that Facebook advertisements are not menus, and aims to protect establishments from being sued for human error."⁶⁸ Opposing the bill, the White House and consumer advocacy groups have averred that it provides too much flexibility, essentially undermining the public health goals that underpin the FDA Menu Labeling Rule. However, many stakeholders find that the FDA Menu Labeling Rule is too strict.⁶⁹ Although this bill has been passed in the House of Representatives, it would have to be both passed by the Senate (in identical form) and then signed by the President in order to become law. In the event this bill does become law, its changes would substantially alter the current FDA Menu Labeling Rule, requiring the FDA to develop a new set of rules and accompanying guidance.⁷⁰

⁶⁶ 79 Fed. Reg. 7115.

⁶⁷ U.S. Department of Health and Human Services, Food and Drug Administration, Center for Food Safety and Applied Nutrition, *Guidance for Industry: A Labeling Guide for Restaurants and Retail Establishments Selling Away-From-Home Foods - Part II (Menu Labeling Requirements in Accordance with 21 CFR 101.11)* (2016) (hereinafter "Guidance").

⁶⁸ GovTrack, H.R. 2017: Common Sense Nutrition Disclosure Act of 2015, <https://www.govtrack.us/congress/bills/114/hr2017>.

⁶⁹ Keller and Heckman LLP, *Menu Labeling in the House: FDA Requirements*, The National Law Review, February 17, 2016, <http://www.natlawreview.com/article/menu-labeling-house-fda-requirements>.

⁷⁰ GovTrack, Summaries for the Common Sense Nutrition Disclosure Act of 2015, <https://www.govtrack.us/congress/bills/114/hr2017/summary>.

A. What Establishments are Subject to the FDA Menu Labeling Rule?

The FDA Menu Labeling Rule imposes its nutritional labeling requirements on all “covered establishments,” which are defined as “restaurants or similar retail establishments” that:

- 1) have 20 or more locations;
- 2) do business under the same name; and,
- 3) offer for sale substantially the same menu items.⁷¹

“Restaurants and similar retail establishments” is broadly defined. In addition to including quick service and table service restaurants, “restaurants or similar food establishments” is defined to include: bakeries, cafeterias, coffee shops, convenience stores, delis, food service facilities and concession stands located within entertainment venues (such as amusement parks, bowling alleys, and movie theaters), food service vendors (such as ice cream shops and mall cookie counters), food takeout or delivery establishments (such as pizza takeout and delivery establishments) grocery stores, and retail confectionary stores.⁷² There are, however, several noted exemptions - the FDA Guidance provides that the following categories of establishments do not fall under the purview of the FDA Menu Labeling Rule:

- 1) An establishment that happens to provide free food served to employees or “free” to consumers (for example, a hotel serving free breakfast to its guests);⁷³
- 2) School lunch programs or breakfast programs (as defined by the United States Department of Agriculture);⁷⁴
- 3) Transportation carriers such as trains or airplanes, lunch wagons and in-patient only food-service facilities located within hospitals;⁷⁵
- 4) Mobile vendors — such as those who walk through the stands at sports stadiums selling food and beverages — and food trucks and sidewalk carts, as they do not generally have a fixed location or site;⁷⁶ and
- 5) Catering services as, most often, a catered event is not considered a restaurant or similar retail food establishment that offers for sale standard menu items. Alternatively, however, if a restaurant qualifies as a covered establishment, and it offers off-site catering, that restaurant must provide calorie declarations for standard menu items listed on its catering menu to the extent such catering menu meets the definition of a “menu” under the rule.⁷⁷

Aside from these specific exemptions, determining applicability of the FDA Menu Labeling Rule for the average franchisor lies in analyzing whether the other triggers for application set forth above are met: (1) 20 or more locations operating under (2) same name; and, (3) selling the same

⁷¹ 21 CFR 101.11(a).

⁷² See Guidance *supra* note 67, at ¶3.9.

⁷³ *Id.* at ¶5.4.

⁷⁴ *Id.* at ¶4.2.

⁷⁵ *Id.* at ¶¶4.2, 5.4.

⁷⁶ *Id.* at ¶5.9.

⁷⁷ *Id.* at ¶5.5.

menu items. The 20 or more locations prong is self-explanatory - both company-owned and franchised units would certainly be counted. With respect to the “same name” prong, the FDA Guidance explains that the term “name” means either the establishment’s name as presented to the public or, if there is no specific name presented to the public (e.g., an establishment with a generic descriptor such as “concession stand”), the name of the parent entity of the establishment.⁷⁸ The term “name” is interpreted broadly to include even slight variations due to things such as the region, location or size (e.g., “New York Ave. Burgers” and “Pennsylvania Ave. Burgers” or “ABC” and “ABC Express”).⁷⁹ The FDA has clarified that with respect to determining whether establishments are operating under the same “name,” the determination should be based on the name that the public “sees,” such as on the front of the establishment or on menu boards.⁸⁰ With respect to the “same menu” prong, the FDA Guidance explains that a restaurant is offering the same menu items if it is offering “a significant proportion of menu items 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 (for example, ‘Bay View Crab Cake’ and ‘Ocean View Crab Cake’).”⁸¹

RELATED Q/A FROM FDA GUIDANCE SECTION 5.7

Question: “I am the owner of a chain of 20 restaurants. Twelve of my restaurants are full-service restaurants and operate under the name Ed’s Bar & Grill. My other restaurants operate under Super Studio 3, Super Studio Lite and Super Studio Grill. These establishments are generally found in movie theaters or may be stand alone in malls. We offer four variations of expanded menus in each establishment. How would I determine whether my restaurants are covered establishments?”

Answer: In general . . . a covered establishment is a restaurant or similar retail food establishment that is part of a chain of 20 or more locations doing business under the same name and offering for sale substantially the same menu items. An establishment is not covered unless each criterion for coverage is satisfied. We would consider the establishments described in the question that operate under the names “Super Studio 3,” “Super Studio Lite” and “Super Studio Grill” to be doing business under the same name, even though there are slight variations in the names To the extent these establishments are part of a chain of 20 or more locations doing business under the same name and offering for sale substantially the same menu items, they would meet the criteria for coverage under the menu labeling final rule and be required to provide calorie information and other nutrition information for standard menu items and otherwise comply with the menu labeling final rule.

We would not consider the full service restaurant, “Ed’s Bar & Grill,” as described in the question, to be doing business under the same name as the “Super Studio” restaurants. Accordingly, the number of “Ed’s Bar & Grill” locations would not count in considering whether the “Super Studio” restaurants are part of a chain with 20 or more locations. Further, because “Ed’s Bar & Grill,” as described in the question, only have 12 locations, “Ed’s Bar & Grill” would not likely be a covered establishment.”

⁷⁸ *Id.* at ¶3.6.

⁷⁹ *Id.*

⁸⁰ *Id.* at ¶5.6.

⁸¹ *Id.* at ¶3.16

B. What Nutritional Disclosures does the FDA Menu Labeling Rule Require?

The FDA Menu Labeling Rule requires that “covered establishments” provide the following nutrition information on each menu or menu board: (1) the number of calories in each listed “standard menu item” (defined below) as usually prepared and offered for sale; (2) the following succinct statement designed to enable customers to understand the significance of the calorie information provided: “*2,000 calories a day is used for general nutrition advice, but calorie needs vary*”; and, (3) the following statement regarding the availability of additional written nutrition information: “*Additional nutrition information is available upon request.*”⁸² The FDA Guidance on the content and detail of such disclosures under various circumstances is extremely specific and franchisors are encouraged to consult with an attorney to ensure compliance. We attempt to synthesize some of the more important concepts below.

How to Display Calories. The calorie disclosure, which must be made using the designation “Calories” or “Cal,” is to appear as a heading above a column listing the number of calories for each menu item or adjacent to the number of calories for each menu item.⁸³ If the term “Calories” or “Cal” appears as a heading above the column of calorie declarations, the term must be readily discernible: the FDA Guidance provides for a type size no smaller than the smallest type size of the name or price of a menu item in the same color or a color as least as conspicuous as the color used for the for the name or price, and in the same contrasting background or a background at least as contrasting as the background used for the name or price.⁸⁴ If the term “Calories” or “Cal” appears next to the number of calories for the menu item, the term must appear in the same type size and in the same color and contrasting background as the number of calories.⁸⁵ The FDA Guidance makes clear that for electronic menus and menus on the internet, calories must be listed as they would be on a traditional menu and calories may not be listed on a screen that is separate from the actual menu listing on the electronic or internet menu.⁸⁶

Where to Display Calories. The number of calories must be listed adjacent to the name or price of all standard menu items contained on all menus or menu boards.⁸⁷ Menus and menu boards are defined as a primary writing(s) from which a customer makes an order selection.⁸⁸ Importantly, the primary writing may include more than one form, including: breakfast, lunch and dinner menus; dessert menus; beverage menus; children’s menus; takeout menus; menus mailed or delivered from a restaurant; catering menus; electronic menus; and, menus on the internet. Per the FDA Guidance, determining whether a writing is part of the primary writing of the covered establishment from which a customer makes an order selection depends on a number of factors, including whether the writing lists the name (or picture) of a standard menu item and the price of the standard menu item, and whether the writing can be used by the customer to make an order selection at the time the customer is viewing the writing.⁸⁹ If a writing meets these requirements, it constitutes a “menu” or “menu board” necessitating that it includes the required nutritional disclosures. Typically, advertising or marketing materials (including coupons) would not be considered a primary writing from which a customer is able to make an order selection in that they lack all of the aforementioned qualities. If, however, a coupon includes the name of the standard

⁸² *Id.* at ¶5.14.

⁸³ 21 CFR 101.11(b)(2)(i)(A)(3).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Guidance *supra* note 67, at ¶5.23.

⁸⁷ *Id.*

⁸⁸ *Id.* at ¶5.13.

⁸⁹ *Id.*

menu item, the price of the standard menu item, and a phone number or web address for placing the order, the coupon can be used to make an order at the time of its viewing and would therefore be considered a menu requiring nutrient disclosure.⁹⁰

How to Approach Varieties/Flavors. When a menu offers a number of flavors or varieties of standard menu items (e.g., soft drinks or ice cream) or ways in which a standard menu item may be prepared (e.g., baked or fried), a covered establishment must list the calories separately for each flavor or variety listed on the menu.⁹¹ If, however, the menu does not specifically list each flavor and instead includes only a general description of the variable menu item (e.g., “soft drinks,” “ice cream,” “chicken baked or fried”), the calories must be disclosed for each option with a slash between the two calorie amounts where there are only two options available, or as a range of the lowest caloric variation to the highest caloric variation where more than two options are available.⁹²

- *Toppings/Extras.* In situations in which a variable menu item is offered for sale with the option of adding toppings listed on the menu or menu board, the covered establishment must first declare the calories for the basic preparation of the menu item as listed (e.g., “small pizza,” “scoop of ice cream”).⁹³ The covered establishment must then also list the calories that each topping listed on the menu or menu board (e.g., pepperoni, onions, mushrooms on pizza; chocolate, walnuts, sprinkles on ice cream) would add to the basic preparation.⁹⁴ Moreover, the calories for each topping listed must be disclosed specifically for each size of the menu item, or disclosed using a slash between the two calorie declarations for each topping where there are only two available sizes (e.g., “adds 150/250 cal.”) or using a range where there are more than two sizes of the menu item available (e.g., “adds 100 – 300 cal.”).⁹⁵
- *Combination Meals.* To the extent a menu offers combination meals (e.g., a hamburger with a salad or fries), the calories must be disclosed for each option with a slash between the two calorie disclosures if there are two options (e.g., “200/400 cal”) and as a range if there are three or more options (e.g., “250 to 500 cal”).⁹⁶ If the menu includes a choice to increase or decrease the size of a combination meal, the calorie increase or decrease between the sizes must be disclosed with a slash if there are two options (e.g., “Adds 100/150 cal,” “Subtracts 100/150 cal”) or as a range if there are three or more options (e.g., “Adds 100-250 cal,” “Subtracts 100-250 cal”).⁹⁷ On the other hand, where a menu allows a consumer to combine standard menu items for a special price (e.g., combine any sandwich with any soup or salad), and the calories for each standard menu item are on the menu so that the consumer can add the constituent items, it is not necessary to disclose the total calories for the combined meal.⁹⁸

⁹⁰ *Id.* at ¶5.18

⁹¹ *Id.* at ¶5.28.

⁹² *Id.*

⁹³ 21 CFR 101.11(b)(2)(i)(A)(5).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 101.11(b)(2)(i)(A)(6).

⁹⁷ *Id.*

⁹⁸ *Id.*

Self-Service/Display Items. Covered establishments must also provide calorie disclosures for standard menu items that are self-service or on display, even if they are not listed on the menu or menu board. These calorie disclosures must be made by displayed food item (e.g., per bagel, per slice, per muffin) or if the item is not offered for sale in a discrete unit, the calories per serving (e.g., scoop, cup) must be disclosed along with an indication of the serving designation (e.g., 100 cal. per scoop or 100 cal. per muffin).⁹⁹ There are three options for the placement of the calorie information for standard menu items that are self-service or foods on display: (1) a sign adjacent to and clearly associated with the corresponding food (e.g., 150 calories per scoop); (2) a sign attached to a sneeze guard with the calorie declaration and the serving or unit used to determine the calorie content above each specified food so that the consumer can clearly associate the calorie declaration with the food; or, (3) a single sign listing the calorie declaration for several food items along with the names of the food items, so long as the sign is located where a consumer can view the name, calorie disclosure and serving or unit of a particular item while selecting the item.¹⁰⁰

The Succinct Statement. So the consumer may appreciate the significance of the calorie disclosures, the following statement must be posted prominently on the menu or menu board in a type size no smaller than the smallest type size of any calorie declaration and in the same color or in a color at least as conspicuous as that used for the calorie declarations and with the same contrasting background or a background at least as contrasting as that used for the calorie declarations: “2,000 calories a day is used for general nutrition advice, but calorie needs vary.”¹⁰¹ For children’s menus, a covered establishment may use the following succinct statements: “1,200 to 1,400 calories a day is used for general nutrition advice for children ages 4-8 years, but calorie needs vary” or “1,200 to 1,400 calories a day is used for general nutrition advice for children ages 4-8 years and 1,400 to 2,000 a day for children 9-13 years, but calorie needs vary.”¹⁰² The succinct statements must be listed on the bottom of each page of the menu.¹⁰³

Additional Nutritional Information. In addition to providing calorie disclosures and the disclosure regarding recommended daily calorie allotment, all menu and menu boards must have the following statement on the bottom of the first page containing menu items: “Additional nutrition information available upon request.”¹⁰⁴ The following are the categories of nutrition information that must be available in written form upon a customer’s request:

- 1) Total Calories;
- 2) Calories from fat;
- 3) Total fat;
- 4) Saturated fat;
- 5) Trans fat;
- 6) Cholesterol;
- 7) Sodium;
- 8) Total carbohydrates;

⁹⁹ *Id.* at 101.11(b)(2)(iii)(A).

¹⁰⁰ *Id.*

¹⁰¹ 21 CFR 101.11(b)(2)(i)(B)(1).

¹⁰² Guidance *supra* note 67, at ¶5.48.

¹⁰³ *Id.* at ¶5.51.

¹⁰⁴ 21 CFR 101.11(b)(2)(i)(C).

- 9) Dietary Fiber;
- 10) Sugars; and
- 11) Protein.¹⁰⁵

If a standard menu item contains “insignificant” amounts of all of these additional nutrient categories, an establishment is not required to have the additional nutrition information available in written form. If a standard menu item contains “insignificant” amounts of six or more of the above nutrient categories, the additional nutrient disclosures may be provided in a simplified format (in a column, list, or table) for only the following nutrients: total calories, total fat, total carbohydrates, protein, sodium, calories from fat and any other nutrients that are present in more than “insignificant” amounts.¹⁰⁶ An “insignificant” amount is an amount below 5 units of the applicable nutrient category, except for total carbohydrates, dietary fiber, and protein, for which an “insignificant” amount of must be declared as “less than one gram.”¹⁰⁷ That being said, establishments that make a specific nutrient content or health claim about a food offered for sale (e.g., “low fat” or “high in vitamin C”) must provide information on the particular nutrient amounts that are the basis for the claim.¹⁰⁸

RELATED Q/A FROM FDA GUIDANCE SECTION 5.17

Question: “If a pizza coupon that states “1 large 2 toppings pizza \$9.99” is attached to a takeout menu, does the menu item on this coupon require calorie information?”

Answer: If a coupon for a standard menu items states “1 large 2-topping pizza \$9.99” and is attached to a takeout menu where the calories for such standard menu item are declared elsewhere on the takeout menu, then the calorie declaration on the coupon would not be needed, as consumers would already have access to the calorie information for the standard menu item elsewhere on the menu. For a stand-alone coupon, if it can be used to place an order (i.e., it contains the name of a standard menu item, its price, and a phone number or website from where the customer can place an order), then the calorie declaration would need to be provided in accordance with 21 CFR 101.11(b)(2)(i)(A).”

C. For what Menu Items does the FDA Menu Labeling Rule Require Nutrient Disclosure?

The FDA Menu Labeling Rule requires the requisite nutrient disclosures for all “standard” menu items, defined as items “routinely included on a menu” or “routinely offered” as a self-service/display item.¹⁰⁹ It covers food that it is usually eaten on the premises, while walking away, or soon after arriving at another location.¹¹⁰ While the FDA Guidance does not define “routinely,” it does provide that the following items are exempt from the calorie and other nutrition labeling requirements:

- 1) “*Temporary*” menu items – menu items that appear on the menu for less than 60 days per calendar year (which calendar days need not be consecutive).¹¹¹ Thus,

¹⁰⁵ *Id.* at 101.11(b)(2)(ii)(A).

¹⁰⁶ *Id.* at 101.11(b)(2)(ii)(B).

¹⁰⁷ *Id.*

¹⁰⁸ Guidance *supra* note 45, at ¶3.2.

¹⁰⁹ *Id.* at ¶3.19.

¹¹⁰ 21 CFR 101.11(a).

¹¹¹ Guidance *supra* note 67, at ¶3.20.

it is safe to assume that a routine menu item that must be labeled is one that appears for 60 or more total calendar days per year.

- 2) *Daily specials* - menu items offered on a particular day and not routinely listed on a menu or offered by the covered establishment, and that are promoted as a “special” for that particular day.
- 3) *Custom orders* - items prepared in a specific way based on a customer’s request that deviates from the covered establishment’s usual preparation of the menu item.
- 4) *Customary market test items* - menu items that appear on a menu for fewer than 90 consecutive days and are used to test consumer acceptance of the product type.
- 5) *Condiments that are meant for general use* - those kept on a table or behind the counter and are for use by the customer.
- 6) *Self-service food and food on display* - items that are offered for less than 60 days per calendar year (e.g., holiday gift tins of popcorn) or fewer than 90 consecutive days to test consumer acceptance.
- 7) *Alcoholic Beverages on display* - bottles of alcohol that are on display behind a bar that a bartender uses to prepare drinks that are not listed on a menu or menu board.¹¹²

With respect to alcoholic beverages, the FDA Menu Labeling Rule covers alcoholic beverages that are standard menu items listed on a menu or menu board.¹¹³ However, the FDA Menu Labeling Rule does not apply to alcoholic beverages that are foods on display and are not self-service foods.¹¹⁴ Accordingly, as referenced above, bottles of alcohol that are on display behind a bar that a bartender uses to prepare mixed drinks that are not on the menu do not need to be labeled.¹¹⁵ Similarly, to the extent that beers on tap are not self-serve, they too are exempt from the labeling requirements if they are not listed on menus or menu boards. Importantly, however, to the extent a menu or menu board lists beers on tap as standard menu items, then the calories for such beers on tap must be provided.¹¹⁶ And for wine, the calorie declaration must represent how the wine is offered to the customer. If the wine is sold by the glass, then the calorie information must be for the glass.¹¹⁷ If the wine is sold by the bottle, but served by the glass, then the establishment has the option of providing the calorie information for the entire bottle or per glass provided the number of glasses in the bottle is also included (e.g., 120 cal/glass, 6 glasses per bottle).¹¹⁸

<u>RELATED Q/A FROM FDA GUIDANCE SECTION 5.10</u>

¹¹² *Id.* at ¶5.2.

¹¹³ *Id.* at ¶7.5.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at ¶7.6.

¹¹⁷ *Id.* at ¶7.8.

¹¹⁸ *Id.* at ¶7.7

Question: “The menu labeling final rule only applies to items that are standard menu items at covered establishments. If there is a restaurant chain that sells some specific dishes in less than 20 of its locations, would those specific items be covered? For example, if Mary’s Seafood Restaurant only sells “Cajun-style shrimp” in its New Orleans’s location (i.e., not in any other Mary’s Seafood Restaurant across the country), would this dish be covered?”

Answer: If the New Orleans location of Mary’s Seafood Restaurant is a covered establishment and the “Cajun-style shrimp” is sold as a standard menu item at such establishment, this dish would be covered under 21 CFR 101.11 even though it is only sold at one location.”

D. How are Covered Establishments to Determine Nutrient Content?

For purposes of disclosure, the number of calories in a standard menu item is to be based on how the menu item is typically prepared. The number of calories must be calculated to the nearest 5-calorie increment up to and including 50 calories and to the nearest 10-calorie increment above 50 calories, except that amounts less than 5 calories may be expressed as 0.¹¹⁹ In ascertaining the calorie and other nutritional values, covered establishments must have a “reasonable basis” for the calculations and the actual calorie and nutritional content of the food items, which must be accurate and consistent with the information disclosed.¹²⁰ To ensure this consistency, a covered establishment should take all reasonable steps to ensure that its preparation and service of menu items are the same as those used to determine the calorie and nutrient declarations. The FDA Guidance suggests the following as means for determining the required calorie and nutritional disclosures: nutrient databases such as the USDA National Nutrient Database for Standard Reference; published cookbooks that contain nutritional information; laboratory analyses; or, any other means that is reasonable.¹²¹ Covered establishments must keep records of how they arrive at the nutrient values.¹²² The FDA recommends that such records be maintained at the covered establishment or the corporate headquarters during the entire period that the standard menu item is offered for sale.¹²³

RELATED Q/A FROM FDA GUIDANCE SECTION 6.2

Question: “How closely must individual portions of my standard menu items match the nutrient values that I have determined for them?”

Answer: The calorie and nutrient declarations for your standard menu items must be accurate and consistent with the nutrient values you determined using a reasonable basis. You must take reasonable steps to ensure that you prepare your product (that is, the types and amounts of ingredients you use, the cooking process, temperatures, etc.) and how you serve your product (that is, the amounts of that item that are offered for sale in a typical serving) are the same as those used to determine the calorie and nutrient declarations. (21 CFR 101.11(c)(2).”

¹¹⁹ 21 CFR 101.11(b)(2)(i)(A)(2).

¹²⁰ Guidance *supra* note 45, at ¶6.1, 6.5.

¹²¹ *Id.*

¹²² *Id.* at ¶6.4

¹²³ *Id.*

E. How does the FDA Menu Labeling Rule Interact with State Laws?

The FDA Menu Labeling Rule has the advantage of imposing broad-based and consistent regulations that pre-empt any inconsistent state regulations directed towards restaurants covered by the FDA Menu Labeling Rule. State and local governments may not impose different or additional nutritional labeling requirements for food sold in a covered establishment.¹²⁴ They may, however, enact laws that have the same requirement as the federal law, allowing them to mirror and enforce the requirements on their own instead of relying on the federal government to do so.¹²⁵ In addition, they may impose requirements, both different and stricter, for establishments not covered by the FDA Menu Labeling Rule.¹²⁶

Accordingly, for example, New York City's labeling law will continue to apply to restaurants that operate in 15 or more, but less than 20, locations. Once a restaurant operates in 20 or more locations, it is subject only to the FDA Menu Labeling Rule. Based on the nationwide consistency provided by the FDA Menu Labeling Rule, a franchisor that does not otherwise satisfy the definition of a "covered establishment" may nevertheless voluntarily register to be subject to the FDA Menu Labeling Rule.¹²⁷ A franchisor that voluntarily registers to comply with the FDA Menu Labeling Rule (like a franchisor that is bound by the FDA Menu Labeling Rule) cannot be subject to state or local nutrition labeling requirements that are not identical to the FDA Menu Labeling Rule.¹²⁸

RELATED Q/A FROM FDA GUIDANCE SECTION 8.3

Question: "May an individual restaurant or similar food establishment that is part of a chain of fewer than 20 locations register or must an official for the entire chain register all establishments?"

Answer: An authorized official of an individual restaurant or similar retail food establishment or of a chain of restaurants or similar retail food establishments can determine whether to register a single establishment or several establishments within the chain."

VI. So What? Consequences of Non-Compliance

A. For Everyone

One of the most cited areas of confusion from the FDA's proposed rule is related to enforcement and consequences when restaurants fail to comply with the menu labeling standards. The FDA Guidance reiterated the range of possible penalties for non-compliance and provided some additional clarity in response to enforcement questions. Consistent with the final rule, if calorie or related nutrition information is inaccurate, the foods are deemed "misbranded" and subject to the same penalties to which misbranded foods are subject under the Federal Food, Drug, and Cosmetic Act (the "FDCA").¹²⁹ The FDCA's primary purpose is to prevent misbranded

¹²⁴ WILLIAM MITCHELL COLLEGE OF LAW, PUBLIC HEALTH LAW CENTER, FEDERAL MENU LABELING LAW (June 2011), <http://publichealthlawcenter.org/sites/default/files/resources/ship-fs-ww-foodmenulabel-2011.pdf>; Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 79 Fed. Reg. 7115, 71249.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Guidance *supra* note 67, at ¶8.1.

¹²⁸ *Id.*

¹²⁹ Guidance *supra* note 67, at 49.

articles from entering consumer's stores and homes, and it provides a number of mechanisms for penalizing noncomplying restaurants.¹³⁰

Section 331 of the FDCA, in relevant part, prohibits introducing, delivering for introduction, or receiving of a misbranded food in intrastate commerce, and misbranding a good while it is in interstate commerce or being held for sale after shipment; misbranding of any food in interstate commerce; and the receipt in interstate commerce of any food that is misbranded, and the delivery or proffered delivery thereof, for pay or otherwise.¹³¹ Under Section 333, violators of these rules "shall be imprisoned for not more than one year or fined not more than \$1,000, or both."¹³² The section additionally provides that any person who commits (the *felony* of) misbranding after a conviction for the same, or who commits misbranding with the intent to defraud or mislead, shall be imprisoned for up to three years and/or fined up to \$10,000.¹³³ Additionally, the United States can bring a civil action in federal court to enjoin a person who commits a prohibited action,¹³⁴ and any food that is misbranded during one of the various stages of interstate commerce described above is subject to seizure.¹³⁵

In terms of enforcement, the FDA is the entity tasked with enforcing these penalties for noncompliance with the menu labeling provisions.¹³⁶ Alternatively, states or localities may establish and enforce menu labeling requirements, so long as they are identical to the federal regulations.¹³⁷ In the FDA Guidance, the FDA expressed its intent to work with state and local authorities as needed to ensure uniformity in the implementation and enforcement of these rules.¹³⁸ While consistent enforcement is certainly a relief to the ears of the restaurant industry, implementation of this rule is likely to cause an uptick in consumer class actions, as plaintiffs and their counsel will seek opportunities to recover from incorrect or imprecise menu labeling under the terms of the enacted state laws.

B. For Franchisors – Risks of Franchise System Non-Compliance

i. Consumer Litigation and Potential Class Actions

Prior litigation involving restaurant chains and menu labeling demonstrates the parallels and pathways the plaintiffs' bar may take to pursue class actions against covered establishments, to which franchisors are particularly vulnerable. In 2008 and 2009, a series of class actions were brought against Brinker International, the operator and franchisor of Chili's Grill & Bar, and DineEquity's subsidiary Applebee's, alleging misrepresentations on restaurant menus.¹³⁹ The class action complaint against Chili's (*Brinker*) alleged that the items advertised on its "Guiltless Grill" menu contained two or more times the fat as advertised.¹⁴⁰ The plaintiffs in cases against

¹³⁰ 25 A.L.R. Fed. 2d 431 (originally published 2008).

¹³¹ 21 U.S.C. § 331.

¹³² 21 U.S.C. § 333.

¹³³ *Id.*

¹³⁴ 21 U.S.C. § 332.

¹³⁵ 21 U.S.C. § 334.

¹³⁶ See, Guidance *supra* note 67.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Kenya Woodruff, et al., *Balancing Innovation and Compliance in an Evolving Food and Drug Industry: A Spotlight on Current Trends*, RECENT DEVELOPMENTS IN FOOD AND DRUG LAW, 2016 ED, 2015 WL 9194935, at *3.

¹⁴⁰ *Id.*; see *Paskett et al. v. Brinker International Inc. et al.*, No. 08-cv-942 (N.D. Tex. 2008).

the parent company of *Applebee's* alleged that laboratory testing showed inaccurate nutritional information on the chain's popular Weight Watchers menu.¹⁴¹

The *Applebee's* Complaint, for example, included allegations that the chain marketed the Weight Watchers menu as offering healthier and less fattening options to prospective customers and that the chain represented that calorie content, fat grams, and Weight Watchers points listed on the menu were accurate, allegedly inducing customer reliance upon those representations.¹⁴² The Complaint went on to offer independent laboratory test results that showed substantial discrepancies between the purported nutritional content and the actual nutrition facts. To demonstrate, plaintiffs listed that the Tortilla Chicken Melt appetizer was advertised to have 13 grams of fat, but actually contained 21.4 grams of fat.¹⁴³ Similarly, the Garlic Herb Chicken was used as an example of the misrepresentation, as the tests showed that it had 18 grams of fat, rather than 6 as advertised.¹⁴⁴ As a result, the items were shown to contain significantly more fat than the amount represented, in violation of the federal nutrition labeling of food statute under 21 C.F.R. § 101.9.¹⁴⁵ Additionally, the Complaint alleged that these practices constituted “unfair, unlawful, and deceptive business practices in violation of the California Civil Legal Remedies Act, Civil Code section 1750, *et seq.*, and have resulted in [*Applebee's*] unjust enrichment.”¹⁴⁶ The Plaintiff and Class Members claimed to have been injured and suffered damages as a result of *Applebee's* wrongful conduct.

The *Brinker* case (against Chili's parent company) involved substantially similar contentions as the *Applebee's* suits. These are not the only two chains that have faced allegations of deception based on food-related representations. Cases like these demonstrate one of the fundamental reasons that menu labeling, albeit well-intentioned, is imprecise as a practical matter and may actually create greater confusion and a higher likelihood of inadvertent misrepresentations. Slight fluctuations in ingredient composition, deviations in cooking methods, or the occasional generous chef can cause wide variances in nutritional information. For example, using an extra tablespoon of butter to cook vegetables adds 100 calories to the total. Even a seemingly minor addition of one ounce of beef in a burger produces the same 100-calorie disparity between projected and actual caloric content.¹⁴⁷ Similarly, variations in size, weight, or composition of food items and ingredients provided by suppliers can contribute to potentially substantial inaccuracies in actual nutritional information of menu items.¹⁴⁸

While the *Brinker* and *Applebee's* suits were ultimately not successful,¹⁴⁹ they serve as an example of one of the risks for franchisors that the plaintiffs' bar, media, or consumer groups will discover and seek to capitalize on purported inaccuracies in restaurants' nutritional information.

¹⁴¹ Woodruff *supra* note 117, at *3; See, *Jones v. DineEquity, Inc.*, No. A128458, 2011 WL 5517830, at *1 (Cal. Ct. App. Nov. 14, 2011).

¹⁴² *DineEquity*, 2011 WL 5517830, at *1.

¹⁴³ *Id.* at *2.

¹⁴⁴ *Applebee's Menu Has False Nutrition Info, Calif. Woman Says*, 16 Andrews Health L. Litig. Rep. 4 (2008).

¹⁴⁵ *DineEquity*, 2011 WL 5517830, at *1.

¹⁴⁶ *Id.*

¹⁴⁷ Woodruff *supra* note 139, at *4.

¹⁴⁸ *Id.*

¹⁴⁹ In the Chili's case, the plaintiff agreed to withdraw the complaint. In the *Applebee's* cases, certain state law claims were unsuccessful due to preemption by the 1990 Nutrition Labeling and Education Act, and the plaintiffs also failed to prove a racketeering claim. See Mike Cherney, *Applebee's Devours Suit Over Nutrition Info*, Apr. 9, 2010 (Law360, New York); http://www.law360.com/articles/160941/applebee-s-devours-suit-over-nutrition-info?article_related_content=1.

The April 2016 FDA Guidance has made clear that franchise systems are subject to both federal and state action for noncompliance. Due to the broad reach and expansive potential for liability, it is more important than ever for franchisors to understand the FDA's position and enforcement mechanisms.

ii. FDA Enforcement

The FDA stated that each individual restaurant or similar food establishment is responsible for disclosing the required nutrition information for its standard menu items and otherwise complying with the related provisions in the FDCA.¹⁵⁰ The rule's vague addition that persons exercising "authority and supervisory responsibility" over such establishments may also be held liable for violations of the FDCA has raised concern for industry franchisors.

One commenter to the rule raised questions about the FDA's lack of a clear "chain of liability" for food that is misbranded under the rule and related provisions of the FDCA.¹⁵¹ Another similarly expressed confusion over "whether the FDA might impose vicarious liability on the franchisor or licensor of a restaurant for such misbranded food, particularly where the franchisor or licensor retains power over the menus and menu boards used by the restaurants."¹⁵² In response to these and other franchise-centric concerns, the FDA only advised that "[a]gency decisions regarding enforcement actions will be determined on a case-by-case basis." The FDA then cited the *Park* doctrine, which stands for the principle that "[t]he [FDCA] imposes upon persons exercising authority and supervisory responsibility reposed in them by a business organization not only a positive duty to seek out and remedy violations but also, and primarily, a duty to implement measures that will insure that violations will not occur. . . ."¹⁵³

The *Park* doctrine is most frequently referenced for its holding that an executive of an FDA regulated firm may not turn a blind eye to FDA regulatory matters, such as quality assurance and safety. The doctrine's origin is a 1975 Supreme Court case where the Court held against the president of a chain of retail food stores based on unsanitary conditions in one of its warehouses under the rationale that "[t]he public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care"¹⁵⁴ The *Park* opinion explained that the purpose of the FDCA is to protect the public, the benefits of which outweigh any harm suffered by corporate defendants. Though the doctrine has been extended beyond the food and drug realm in the decades since the case was decided, the following reasoning for its results may serve as foreshadowing for future menu labeling judgments:

The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.¹⁵⁵

The practical effect of the emphasis of *Park*'s policy justification appears to be the creation of something akin to a strict liability standard for franchisors. The *Park* holding is not exactly

¹⁵⁰ 79 Fed. Reg. 71161 (Dec. 1, 2014).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Patrick O'Leary, *Credible Deterrence: FDA and the Park Doctrine in the 21st Century*, 68 Food & Drug L. J. 137, 143 (2013).

¹⁵⁵ 68 Food & Drug L.J. 137, 143 (2013) (quoting *United States v. Park*, 421 U.S. 658 (1975)).

consistent with typical strict liability; there the Court clarified that, to find against a responsible corporate party, it must be shown that “the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.”¹⁵⁶ Additionally, the *Park* case was looking at the liability of a corporation’s president for his company’s negligence, as opposed to a parent corporation or franchisor’s liability for its franchisee’s negligence. Due to these incongruities, the doctrine may be ill-fitted for addressing a franchisor’s responsibility for misbranding violations by franchisees. Nonetheless, likely due to the deterrent effect the doctrine has historically had on corporate officers, the FDA seems intent on keeping *Park* in its toolbox as a way to ensure that any and all responsible parties are making best efforts to comply with menu labeling standards. Accordingly, this is the only guidance the FDA has provided in its final rule, and the April 2016 FDA Guidance did not expand upon the FDA’s earlier position.¹⁵⁷

The FDA Guidance did, however, explain that the FDA is committed to working flexibly and cooperatively with establishments and to providing educational and technical assistance for state and local regulatory partners to deliver consistent compliance nationwide.¹⁵⁸ At the very least, this should reduce the possibility of franchisors being held to different standards under different laws, and at most, it indicates the FDA’s intent to act with relative leniency while franchise systems work to establish protocols for uniform compliance. In addition, with the release of the FDA Guidance, the FDA has announced that it will conduct webinars and menu labeling workshops to focus on specific stakeholder needs.¹⁵⁹ Although the FDA declined to pre-approve menu board mock-ups, covered establishments can send any questions related to menu labeling requirements to calorieslabeling@fda.hhs.gov.¹⁶⁰ There is also a hotline provided where industry may contact the FDA for questions about compliance with its regulations (1-888-SAFEFOOD).¹⁶¹

VII. What to Do – Practical Steps toward Franchise System Compliance

A. Communicating with Franchisees on Menu Labeling

As would be expected with any system-wide initiative, franchisors should seek to timely and effectively communicate with franchisees about menu labeling to ensure that growing pains are addressed and corrected in time for the May 2017 compliance deadline. Franchisors should not delegate this responsibility to franchisee advisory councils or associations but, instead, will need to take it upon themselves to develop and deliver a consistent and complete message to franchisees about the menu labeling initiative, as well as the franchisor’s expectations and any willingness to assist. Franchisors should be explicit in communicating that the ultimate responsibility for compliance with the menu labeling rule rests upon each restaurant owner, which is consistent with other industry-related laws. Franchisors may direct franchisees to resources on menu labeling, such as the e-mail or hotline described in section VI above. Should a franchisee believe there is an issue with any franchisor-provided information, the franchisor may suggest that franchisees seek independent counsel after promptly notifying the franchisor of any relevant concerns.

¹⁵⁶ *Id.*

¹⁵⁷ See Guidance *supra* note 67.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ 79 Fed. Reg. 71161 (Dec. 1, 2014).

¹⁶¹ *Id.*

Franchisors should plan to check for franchisee understanding in terms of what is required for effective compliance with the rule. Importantly, compliance goes beyond obtaining and maintaining accurate menus and menu boards, and franchisors will want to ensure that franchisees and employees recognize how seemingly insignificant variations in ingredients or cooking methods can result in inaccurate nutrition information. Franchisors should be diligent in making sure franchisees train their frontline employees and cooks to prepare food products appropriately every time.

Providing menu information to franchisees is a valuable franchisor practice because it will save franchisees time and money and will further enhance the franchise system. In exchange for providing such information, the franchisor may seek to require that the franchisee reaffirm its commitment to comply with expected standards or that it indemnify the franchisor for misuse of provided information or related losses due to noncompliance with the franchisor's standards designed to ensure accurate nutritional information. Over time, franchisors may add provisions to their franchise agreements to address menu labeling. However, such additions are a more long term solution and should not be used to substitute a franchisor's duty to look for short term ways to add consistency and protection for the brand. Any necessary updates to operating manuals and other policies may provide an effective way to implement menu labeling standards in a franchise system by the May 2017 deadline.

B. Maintaining Consistency and Uniformity

In light of current knowledge of the rule's requirements, franchisors may wonder if a *laissez faire* approach, in which franchisees are required to undertake their own analyses and labeling, will allow them to sidestep the associated risks. However, the FDA's reference to the *Park* doctrine indicates that a franchisor's decision to require franchisees to handle menu labeling on their own may not eliminate all liability. A franchisor's lack of engagement is similarly not likely to impact the threat of potential claims for inaccurate nutritional information (though it could impact the ultimate outcome of those claims).

In addition to likely being an ineffective means of eliminating franchisor risk, requiring franchisees to handle menu labeling on their own may undermine the brand as a whole. An important staple of a franchise system's success is that consumers know what to expect when they walk through the door and can be confident that they will receive a product that is substantially the same as what is served at other restaurants operating under the same brand. If consumers notice inconsistent menu labeling among franchise locations, the inconsistencies may weaken their confidence in the brand.

Beyond consumer confidence, the digital age demands uniformity from franchise systems. Some consumers access nutritional information on websites before ever setting foot in the restaurant; others access the same information after meals via mobile apps that keep track of calorie consumption. Because of the commonplace use of these types of practices, it may prove impractical for each restaurant in a chain to maintain separate nutritional information. Franchisors should be sure that any restaurant within a chain that does maintain separate nutritional information appropriately and conspicuously discloses such fact on its website. The FDA has recently demonstrated use of company websites in its enforcement activities. Company websites have also been used by plaintiffs' counsel seeking to bolster a false advertising or misrepresentation claim.

Best practices for minimizing risks of liability are likely to develop over time, and the FDA's Guidance provides some comfort for franchisors who fear the effects of providing inaccurate

nutrition labels. However, this comfort is limited to whatever inference one derives from the FDA's purported commitment to practicing understanding and flexibility in enforcing the rule, as the updated guidance only reiterated the rule's decision to assess franchisors' exposure to vicarious liability on a case-by-case basis. In deciding what protocol to implement in the year before the compliance deadline, franchisors will have to weigh the risk of providing inaccurate information against the risk of consumer claims and/or regulatory enforcement action. Menu labeling presents a compelling reason why franchisors should also have clear oversight of their food ingredient and food product supply chain.

A franchisor that provides inaccurate nutritional information to franchisees may be, at worst, liable to such franchisees for damages resulting from inaccurate information, and, at best, viewed as unreliable or unsupportive by franchisees. The menu labeling rule may make it more important than before for franchisees to purchase food products and ingredients exclusively from approved suppliers that meet the franchisor's specifications or that can provide reliable nutritional information for ingredients and food products. Franchisors may facilitate these efforts by working with franchisees and suppliers to develop easily duplicable cooking and measurement methods. Such methods might involve a supplier packaging portions individually or altering operations manuals to specify the use of food scales or measuring cups.

C. Managing Supply Contracts and Supplier Relationships

During the FDA's "grace period" leading up to the May 2017 compliance date, franchisors should review their franchise system's agreements with key suppliers or foodservice distributors to ensure that those parties are only permitted to provide products that comply with the franchisor's specifications. Similarly, franchisors should plan to assess those specifications to ensure that the parameters are clear and will result in consistent products. To the extent that franchisors are relying upon suppliers to provide nutritional information, the relevant agreement should provide for indemnification (in favor of the franchisor and preferably also in favor of franchisees) for inaccurate information. Franchisors may occasionally want to conduct independent laboratory testing to make certain that the products are what the supplier represents them to be, especially when these representations are relied upon by the franchise systems and, in turn, consumers and ultimately the FDA.

VIII. Preliminary Considerations and Action List in Preparing for Implementation

Summarizing the foregoing, to the extent a franchisor subject to the FDA Menu Labeling Rule has not already started preparing for implementation, the following are several preliminary steps that may be worth consideration:

1. Investigate the use of a third party to evaluate the nutrition content of standard menu items and formulate a reasonable basis for calculating the requisite nutritional disclosures. To the extent a third-party is engaged to conduct the nutrient analysis, franchisors should seek indemnification language in the agreement with the third party in case the third party provides inaccurate data and franchisors or their franchisees face resulting liability.
2. Examine supplier relationships to determine whether: labeling efforts can or will be conducted by suppliers; suppliers will contribute to the costs of compliance; and/or, supplier agreements provide for indemnification or other recourse in the event a franchisor or its franchisees face claims or regulatory enforcement associated with

supplier products and potential labeling efforts. In entering supply agreements, attempt to get warranties/representations regarding product uniformity.

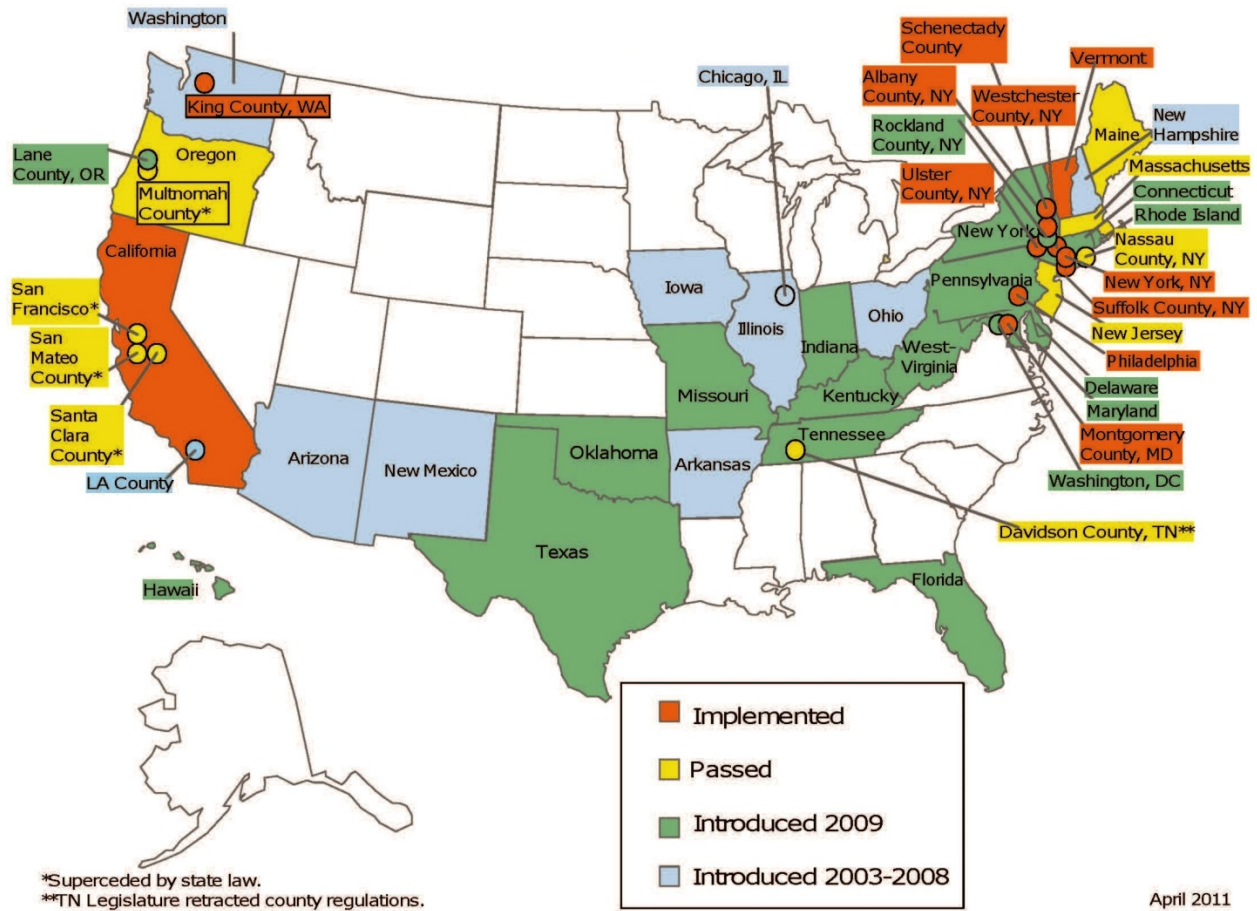
3. Conduct a review of the franchise operations manual and other training materials and procedures to determine if the training and resources provided to franchisees are consistent with the preparation methods necessary to formulate a reasonable basis for the nutrient disclosures. In other words, confirm that franchisees are adequately trained to produce menu items with consistent nutritional content so as to ensure consistency between food items served throughout system units and the nutritional data that will be disclosed to consumers.
4. Consider adding a provision to the franchise agreement during the annual update or upon renewal that attempts to limit a franchisor's liability to franchisees in connection with mislabeling nutritional information or training associated with food preparation.
5. To the extent your system does not already have 20 units, add language in your Franchise Agreement prohibiting franchisees from voluntarily opting into compliance for their individual location(s).
6. Begin working on menu configurations containing the caloric and other required disclosures, including the "succinct statement" regarding caloric intake and "Additional nutrition information is available upon request" disclosure.
7. Determine how the various aspects of implementation will be paid for and/or subsidized. Analyze whether advertisement funds may be allocated for new menu development and/or whether suppliers/vendors may be willing to assist with the cost of new menu development. To the extent franchised units use menu boards, review the franchise agreement to determine financial responsibility for upgrading/replacing the menu boards so that they display the requisite disclosures.
8. Begin working on brochures or another medium for providing the following nutrient measures that must be made available to consumers upon request: (i) total calories from any source; (ii) total calories from fat; (iii) total fat; (iv) saturated fat; (v) trans fat; (vi) cholesterol; (vii) sodium; (viii) total carbohydrates; (ix) sugars; (x) dietary fiber; and (xi) protein.
9. Prepare a system-wide alert to franchisees notifying them of the menu labeling requirement and its impact on the system and their individual operations. Advise franchisees to seek guidance from their own advisors concerning this issue.
10. Create an action plan for notifying franchisees of the menu revisions and rolling out such changes in a manner least disruptive to the system and in compliance with any applicable contractual obligations under the franchise agreements.

IX. Conclusion

Barring further congressional action, it is very likely that menu labeling will be a nationwide reality in a relatively short amount of time. Ultimately, it will be up to franchisors to turn menu labeling requirements to their franchise systems' advantage by embracing the opportunity to provide more information to customers, and by embracing the need for and opportunity to strengthen their supply chains and supplier relationships with respect to product consistency and accuracy of information from suppliers. Like all regulatory matters, franchisors should approach the changes with a well thought out team, timeline, and plan for action.

Appendix 1

State and Local Menu Labeling Policies




Appendix 2

FDA Guidance

CALORIES

Now on the Menu



In November 2014, FDA announced the final menu labeling regulations that will give information to consumers to help them make choices about the food they eat away from home.


WHAT PERCENT OF CALORIES DO PEOPLE CONSUME AWAY FROM HOME?

33% NOW
18% 1970s

RESTAURANTS AND RETAIL ESTABLISHMENTS ARE COVERED ONLY IF THEY HAVE HOW MANY LOCATIONS?

20 OR MORE

Where Will I See Calories?




- MEALS FROM SIT-DOWN RESTAURANTS
- FOODS PURCHASED AT DRIVE-THROUGH WINDOWS
- TAKE-OUT FOOD, LIKE PIZZA
- FOODS, LIKE A SANDWICH, ORDERED FROM A MENU OR MENU BOARD AT A GROCERY STORE
- FOODS YOU SERVE YOURSELF FROM A SALAD OR HOT FOOD BAR AT A RESTAURANT OR GROCERY STORE
- A MUFFIN ON DISPLAY AT A BAKERY OR COFFEE SHOP
- POPCORN PURCHASED AT A MOVIE THEATRE OR AMUSEMENT PARK
- A SCOOP OF ICE CREAM, MILK SHAKE OR SUNDAE FROM AN ICE CREAM STORE
- CERTAIN ALCOHOLIC BEVERAGES AT A RESTAURANT
- CERTAIN VENDING MACHINES

SOURCES:

FOOD LABELING: NUTRITION LABELING OF STANDARD MENU ITEMS IN RESTAURANTS AND SIMILAR RETAIL FOOD ESTABLISHMENTS
FINAL REGULATORY IMPACT ANALYSIS FDA-2011-F-0172

WWW.ERS.USDA.GOV/AMBER-WAVES/2010-JUNE/EATING-OUT-INCREASES-DAILY-CALORIE-INTAKE.ASPX#42F81EF81W

WWW.ERS.USDA.GOV/TOPICS/FOOD-CHOICES-HEALTH/FOOD-CONSUMPTION-DEMAND/FOOD-AWAY-FROM-HOME.ASPX



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