

Understanding the FDA's Menu Labeling Rule

BACKGROUND:

In 2010, legislation was passed mandating national calorie menu-labeling standards for chain restaurants and similar retail food establishments. The Food and Drug Administration (FDA) published its final rules to implement those requirements in November 2014. Unfortunately, FDA failed to address the concerns of small businesses in the rules.

In its final rule, FDA:

- required establishments to create multiple menus throughout a store, contravening Congress's clear intent;
- defined many advertising and marketing materials as menus requiring labels;
- rejected alternative, effective approaches to labeling customizable, variable menu items;
- refused to provide allowances for normal variations in calorie counts due to food and food preparation variations;
- refused to provide businesses with a chance to correct mistakes before they are penalized; and,
- established arbitrary, excessive penalties, including potential criminal penalties and jail time for small business owners.

This rule, as determined by the White House Office of Management and Budget, will require more than 14 million compliance hours, in addition to costs exceeding \$1 billion. Those estimates, however, dramatically understate the costs and burdens associated with the rule. Something must be done to protect small businesses from onerous regulations.

FDA's final rule spurred many questions and concerns that FDA could not answer. Thankfully, FDA has issued a new compliance delay pushing the rule back to May 7, 2018. They also re-opened the public comment period on the original rule through **July 3, 2017.**

More on the Menu Labeling Rule

1. What Establishments are Covered by the Menu Labeling Rule?

The menu labeling rule generally covers any retail establishment with 20 or more locations that sells food that is intended for consumption soon after being purchased (“restaurant-type” food). This includes most hot prepared foods and similar items. It is likely that FDA will take a broad view of what foods are intended to be consumed soon after purchase. It does not matter what type of store is involved – if it sells any food that is meant to be consumed soon after purchase, then it meets that part of the test. The full test for whether the rule applies to a business is whether that business:

- Is part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership, *e.g.*, individual franchises);
 - Note that the number of establishments owned and operated by a particular company/individual is not relevant to this criterion. The key is whether there are multiple locations *doing business under the same name*. For example, if an individual owns and operates three 7-Eleven franchises, or three gas stations that are Exxon branded with a Tiger Mart, those establishments would be subject to the menu labeling rule because there are 20 or more 7-Eleven and Tiger Mart locations, respectively.
- The different locations in that chain offer for sale substantially the same menu items. A business offers “substantially the same menu items” if a significant proportion of its menu items use the same “general recipe” and are prepared in “substantially the same way with substantially the same food components” as items offered in at least 19 other locations within the chain. It is likely that FDA will take a broad view of whether a particular chain offers “substantially the same menu items.”

2. Key Terms

Self-service food:

- Restaurant-type food that is available at a salad bar, hot food bar, buffet line, cafeteria line, or similar self-service facility and that is served by the customers themselves. Self-service food also includes self-service beverages, such as drinks dispensed from a soda fountain and coffee available on a self-service basis

“Food on display”:

- Restaurant-type food that is visible to the customer before making a selection, so long as there is not an ordinary expectation of further preparation by the consumer before consumption.¹ For example, deli meats and cheese generally have an expectation of further preparation by the consumer (*e.g.*, combining with bread to make a ham and cheese sandwich), and thus would not be subject to the menu labeling rules; other foods, such as prepared sandwiches or hot dogs,¹ freshly cooked pizza, and salad and hot food bars do not have an ordinary expectation of further preparation by the consumer before consumption and thus would be subject to the menu labeling rules as food on display.