

\*  
Avenue, NW  
  
20036-1795  
  
202.429.3000  
\*  
202.429.3902

1330 Connecticut  
  
Washington, DC  
  
Tel  
  
Fax

July 30, 2010

TO: NACS

FROM: Steptoe & Johnson

RE: Voluntary Registration of Non-Covered Retail Food Establishments to be Subject to Menu Labeling Requirements Established by the Patient Protection and Affordable Care Act

---

### Overview

On July 23, the Food and Drug Administration (“FDA”) released a Notice informing retail food establishments that are not automatically covered by federal menu labeling requirements how to “opt in” to this regulatory scheme. Stores that choose to do so would be exempt from any state menu labeling rules after the federal regulations are promulgated. Although registration itself is a relatively simple process, doing so would subject retail establishments to a number of potentially onerous menu and nutrition labeling requirements, so stores should consider carefully any applicable alternative state menu labeling rules before deciding to register. The following memorandum provides background on the emerging federal menu labeling requirements, and an overview of how non-covered stores can register to comply with them.

It is important to keep in mind that the new federal menu labeling requirements are not yet in effect. The FDA will be releasing additional rules and regulations by March 23, 2011, several months after which the law’s mandates will become binding on convenience stores.

## **Background**

Section 4205 of the healthcare reform bill President Obama signed earlier this year, formally known as the Patient Protection and Affordable Care Act (“PPACA”), contained new menu and nutrition labeling requirements governing food sales by restaurants, retail food establishments, and vending machine operators. The law requires that these entities, among other things, post the number of calories for each food item on their menu next to the item’s listing, and must prominently display the suggest daily caloric intake. Additionally, self-service food items, such as salad bars, beverage dispensers, and cafeteria lines must display, next to each food item offered, a sign that lists calories per displayed food item or per serving.<sup>1</sup>

These new federal requirements will only apply to those restaurants or similar retail food establishments (including convenience stores) that are part of a chain with 20 or more locations doing business under the same name. Stores that are subject to these new requirements are exempt from any additional state regulations pertaining to menu labeling. Stores that are not covered by the new requirements have two options: (a) they can abide by the menu labeling rules, if any, of the individual states in which they operate, or (b) they can voluntarily comply with the new requirements, and thereby become exempt from individual state menu labeling rules once federal rules are announced. The Notice released on July 23 informs stores how to register with the federal government, thereby becoming subject to PPACA’s requirements.

### **How to Opt-In to the Federal Menu Labeling Requirements**

As indicated above, it is important to remember that stores with fewer than 20 locations operating under the same name are not required to abide by the new federal menu labeling requirements, and are not required to register. However, for stores wishing to voluntarily comply with the new requirements and become exempt from potentially more onerous state menu labeling rules, the FDA has already begun accepting registrations, and will continue to do so on a continuing basis.

Registration must be completed by an “authorized official,” who may be the owner, operator, agent in charge, or any other person authorized by these individuals to register. For stores that have more than one but fewer than twenty locations, an authorized official may register multiple locations at once. Alternatively, an authorized official may register some, but not all, locations. This course of action, which NACS urged FDA to facilitate, may be advisable for stores with locations in more than one state – registration would be advisable where one state’s menu labeling requirements are particularly stringent, yet might not be advisable for those stores in a state with little or no labeling requirements.

---

<sup>1</sup> For more information on the menu labeling requirements in the healthcare reform bill, *see* our memorandum to NACS on the subject, *available at* [http://www.nacsonline.com/NACS/News/Daily/Documents/ND040910\\_menuslabeling.pdf](http://www.nacsonline.com/NACS/News/Daily/Documents/ND040910_menuslabeling.pdf).

Stores wishing to register must provide FDA with the following information:

- The name, address, phone number, e-mail address, and contact information for the authorized official.
- The name, address, and e-mail address of each store being registered, as well as the name and contact information for an official onsite, such as the owner or manager, of each store.
- All trade names the store uses.
- Preferred mailing address (if different from location address for each establishment) for purposes of receiving correspondence; and
- Certification that the information submitted is true and accurate, that the person or firm submitting it is authorized to do so, and that each registered restaurant or similar retail food establishment will be subject to PPACA's menu labeling requirements.

NACS encouraged FDA to make the registration process as easy and manageable as possible. Along those lines, FDA has created an online form that contains fields requesting the above information, available at <http://www.fda.gov/menulabeling>. FDA prefers that the information be submitted by e-mail by typing the complete information into the form, saving it on the registrant's computer as a PDF, and sending it by e-mail to [menulawregistration@fda.hhs.gov](mailto:menulawregistration@fda.hhs.gov). However, if e-mail is not available, the registrant can mail the form to FDA either by filling out the form online and printing it out, or alternatively by printing a blank form and filling in the necessary information by hand. The form can be faxed to FDA (fax #: 301-436-2804) or mailed to the following address:

*Center for Food Safety and Applied Nutrition, Compliance and Information Branch (HFS—681)  
5600 Fishers Lane  
Rockville, MD 20857*

The authorized official must re-register with FDA every other year; the registration will automatically expire if not renewed.

### **Conclusion**

As indicated above, the FDA will be proposing further regulations by March 23 that will implement the more substantive provisions of PPACA's menu labeling requirements. FDA intends to include in those proposed regulations further specifications about the voluntary biannual registration process. Because the specific requirements of the new federal menu labeling regulations have not yet been announced, non-covered retailers should be cautious before registering to abide by them.

Of course, Steptoe will closely monitor developments at the FDA, and aggressively promote the interests of convenience retailers in regulatory proceedings relating to this new law. Please do not hesitate to contact us with any questions or if we can otherwise be of assistance.