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New Menu Labeling Requirements

The Food and Drug Administration (FDA) is preparing to issue guidance concerning new national menu labeling disclosure requirements as amendments to the Federal Food, Drug and Cosmetic Act that were included in the package of healthcare reform legislation passed by Congress earlier this year. Although certain requirements went into effect on March 23, 2010, the FDA is drafting regulations to implement the entire amendment, which are anticipated on or before March 23, 2011. In a recently published preliminary Q&A, the FDA acknowledged that the food industry will need time to comply with the new requirements and that the agency will not initiate enforcement actions for noncompliance until after a phase-in period that will be established in the final guidance.

Who Must Comply?

The amendment applies to any business that meets all of the following criteria:

1. Restaurant or similar retail food establishment
2. Part of a chain
 - a. with 20 or more locations;
 - b. doing business under the same name (regardless of the type of ownership of the locations, e.g., individual franchisees); and
 - c. offering for sale substantially the same menu items

Examples of covered restaurants and food establishments include table service restaurants, quick service restaurants, coffee shops, delicatessens, food takeout and/or delivery establishments, convenience stores, movie theatres, cafeterias, food service vendors (e.g., ice cream shops, sidewalk carts, mall cookie counters) and transportation carriers (e.g., airlines and trains).

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Establishments with fewer than 20 locations must continue to comply with the applicable state and local nutrition labeling laws; however, if those establishments voluntarily provide the nutrition information required by the new laws, they may qualify for an exemption from compliance with the applicable state and local requirements.

What Is Required?

If applicable, the establishment must disclose the following information on its “menu” or “menu board” for each “standard menu item” offered:

1. The number of calories in each item “as usually prepared and offered for sale.” The calorie disclosure must be “clear and conspicuous” and “adjacent to” the name of the standard menu item.
2. A statement that puts the calorie information in the context of a total daily caloric intake
3. A statement regarding the availability of additional nutrition information for each item which must be available upon request by a customer (e.g., calories from total fat, sodium, carbohydrates, and sugars).

The “menu” or “menu board” means the primary writing of the establishment from which a customer makes an order selection. An internet menu or take-out menu may qualify as a “menu” if it can be used as the primary writing from which a consumer makes a selection.

The following foods are not considered “standard menu items” and are not covered under the amendment:

1. Items not listed on the menu or menu board, such as condiments and items placed on a table for general use
2. Daily specials
3. Temporary menu items appearing on the menu for less than 60 days per calendar year
4. Custom orders (e.g., a fast food burger without certain toppings)
5. Food that is part of a customary market test appearing on the menu less than 90 days

Additionally, the new requirements do not apply to certain pre-packaged foods bearing complete nutritional information that customers can examine prior to purchase (e.g., pre-packaged sandwiches in a cooler).

What This Means To You

Pending final guidance from the FDA, franchisors, franchisees and other restaurant and food chains should understand and develop specific plans to implement the new requirements. In particular, based on the current guidance provided by the FDA, all covered establishments should:

1. Determine the proper nutritional information for standard menu items or obtain this information from suppliers
2. Continue to ensure all franchised and company-owned outlets are regulating specific portion control
3. Prepare to display the required information based upon the FDA's guidance

In addition, all franchisors who are active in the franchise sales process should disclose their compliance with the amended law and the FDA requirements under Item 1 of their Franchise Disclosure Document.

Contact Info

If you have any questions about this or other franchise related matters, please contact your Husch Blackwell attorney or one of the following attorneys:

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