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Nutrition Labeling • October 2010

Section 4205 of the Patient Protection and Affordable Care Act (ACA) allows the U.S. Food and Drug Administration (FDA) to enforce new requirements for nutrition labeling of standard menu items for chain restaurants, similar retail food establishments (SRFE), and chain vending machine operators. This section of the ACA applies to the 868¹ chain restaurants as well as other chain establishments that sell food to customers for immediate consumption in Arkansas, requiring them to list certain nutrition facts about the food and beverages they sell.

The intent of this provision, which took effect on March 23, 2010, is to offer consumers access to information that will enable them to make healthier choices, thereby promoting a healthier population and a less encumbered health care system.

WHO IS SUBJECT TO THE NEW PROVISIONS?

Restaurants or SRFE that are part of a chain and meet all three of the following criteria will be subject to the new provisions:

- have 20 or more locations;
- do business under the same name (even if the establishments have different owners, as is the case with individual franchises);
- and sell a consistent selection of menu items

The FDA refers to these entities as “covered establishments.”

Examples of covered establishments include:

- table service restaurants
- quick service restaurants
- coffee shops
- delicatessens
- food take out and/or delivery establishments (e.g., pizza take out and restaurants that offer food delivery)
- convenience stores
- movie theaters
- cafeterias
- salad bars
- buffet lines
- self-service beverage lines
- bakeries/retail confectionary stores
- food service vendors (e.g., lunch wagons, ice cream shops, mall cookie counters, and sidewalk carts)
- transportation carriers (e.g., airlines and trains)
- grocery stores with cafes, food courts or otherwise sell food that is for immediate consumption directly to consumers that meet the criteria above

QUICK FACTS

- Applies to chain restaurants and chain vending machine operators with 20 or more locations under the same name with substantially the same menu items
- Does NOT apply to restaurants with 19 or less locations, corporate caterers with varied menus, operations that cater individual events, or vending machine operators with machines in 19 or less locations
- Effective March 23, 2010, but some provisions depend on the FDA to issue rules before they can be enforced.
- The FDA intends to publish their final rules around December 2010.

Chain vending machine operators that own machines in 20 or more locations must also list the calorie information of the items in their machines close to each article of food.

WHO IS NOT SUBJECT TO THE NEW PROVISIONS?

Unless a restaurant, SRFE, or chain vending machine operation meets the criteria listed above, they are not subject to the new FDA provisions. Examples of establishments that do not have to comply with federal guidance (non-covered establishments) include:

- a restaurant, SRFE or vending machine operator that is part of a chain with 19 or less locations
- corporate caterers who tailor their menu items to each client, offering a varied menu based on varied recipes
- operations that cater individual events (as long as the food is not sold directly to the consumer)

In the event that a non-covered establishment would like to voluntarily follow the FDA's nutrition labeling requirements, they may register biennially (every other year) with the FDA.

WHAT NUTRITION INFORMATION MUST BE DISCLOSED?

According to the FDA, covered establishments are required to list the following items on their menus:

- the number of calories in each standard menu 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;
- a statement that puts the calorie information in the context of a total daily caloric intake;
- a statement regarding the availability of additional written nutrition information that can be provided upon request, and;
- calorie information (per serving or per food item) for self-service items and food on display, on a sign adjacent to each food item

Within this section of the law, the term "menu" refers to the primary writing of the covered establishment from which a consumer makes an order selection, including menus, menu boards, drive-through menu boards, internet menus and take out menus.

EXCEPTIONS

Since many covered establishments vary their menus on occasion, they do not have to provide nutrition information for the following items:

- condiments
- daily specials
- temporary items appearing on the menu for less than 60 days
- market test items appearing for less than 90 days
- custom orders

WRITTEN PER-SERVING NUTRITION INFORMATION COVERED ESTABLISHMENTS MUST PROVIDE UPON CONSUMER REQUEST

- Total number of calories
- Total fat
- Saturated fat
- Cholesterol
- Sodium
- Total carbohydrates
- Complex carbohydrates
- Sugars
- Dietary fiber
- Total protein

ENFORCEMENT

The FDA has acknowledged that the food and beverage industry may need additional guidance from the FDA before it can implement changes to menus. The industry will also need time to comply with these provisions once the FDA issues guidance. Accordingly, the FDA will likely refrain from enforcing these provisions until after they issue their final guidance in December of 2010.

Note: Information shared in this overview is based on the law, interim rules and regulations as they are known at this time, and is ACHI's best interpretation of the information. As the law continues to be written into final rules and regulations, it will be further interpreted. Details may change during this process.

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Endnotes

¹ Manta. "6,783 Restaurants in Arkansas." *Manta*. N.p., n.d. Web. 23 Sept. 2010. <http://www.manta.com/mb_44_C432C_04/restaurants/arkansas>

² Opencongress.org. "H.R.3590 - Patient Protection and Affordable Care Act, SEC. 4205. NUTRITION LABELING OF STANDARD MENU ITEMS AT CHAIN RESTAURANTS." *Opencongress*. N.p., n.d. Web. 28 Sept. 2010. <<http://www.opencongress.org/bills/111-h3590/text>>

³ U.S. Department of Health and Human Services. U.S. Food and Drug Administration. Draft Guidance for Industry: Questions and Answers Regarding Implementation of the Menu Labeling Provisions of Section 4205 of the Patient Protection and Affordable Care Act of 2010." *U.S. Food and Drug Administration*. N.p., n.d. Web. 28 Sept. 2010. <<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm223266.htm>>

⁴ ---. "Guidance for Industry: Questions and Answers Regarding the Effect of Section 4205 of the Patient Protection and Affordable Care Act of 2010 on State and Local Menu and Vending Machine Labeling Laws." *U.S. Food and Drug Administration*. N.p., n.d. Web. 30 Sept. 2010. <<http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm223408.htm>>