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Day In Washington

Proposed FDA Expansion of Restaurant Menu Labeling to Grocery Stores

Supermarket Industry Impact

FDA's proposed menu labeling rule would expand menu labeling to grocery stores, which oversteps the language and statements surrounding the inclusion of "Nutrition Labeling of Standard Menu Items at Chain Restaurants" (Sec. 4205) in the Patient Protection and Affordable Care Act (P.L. 111-148) as well as any of the preceding state and municipal menu labeling laws. FDA also outlined an "Option 2" to limit menu labeling to establishments that are primarily restaurants.

Initial compliance costs of menu labeling for grocery stores will exceed \$1 billion, according a survey of the compliance personnel who would be required to implement menu labeling in grocery stores. Those costs include nutrition analysis of each item, developing corresponding menu boards and signs, store-level training and recordkeeping. Nutrition analysis will require many retailers to enlist outside labs, verification and labeling firms at a likely charge of \$1,000 per item for approximately 1,500 items for an average supermarket. Stores will incur hundreds of millions of dollars more in recurring costs since any variability or changes in ingredients, recipes or suppliers requires new nutrition analysis, verification and labeling/signage.

Position

The supermarket industry supports the *Common Sense Nutrition Disclosure Act* (H.R. 1249/S. 1756), which adopts FDA's less expansive scope to limit menu labeling to establishments that are primarily restaurants. Food retailers have sought FDA adoption of the agency's "Option 2" alternative, but FDA has declined requests from the supermarket industry to discuss concerns and comments.

Background

Grocery stores were NOT a target of federal or state restaurant menu labeling laws. The law was intended to provide a federal standard for chain restaurants with 20 or more locations to preempt various state and local menu labeling laws, none of which regulate grocery stores. No state or city has regulated grocery stores under restaurant menu labeling laws. More than 95% of foods sold at grocery stores are already labeled with NLEA Nutrition Facts. Grocery stores also comply with country-of-origin, allergen, and ingredient labeling and food safety recall notification rules not applied to restaurants.

Cost-benefit analysis of FDA's menu labeling regulations supports H.R. 1249/S. 1756 and FDA's Option 2 as consistent with the President's E.O. 13563, which directs agencies to use the least burdensome tools to achieve regulatory ends. A September 2011 OMB report listed menu labeling as the third largest regulatory burden of any law under implementation. FDA's preliminary impact analysis could not quantify a benefit of the agency's proposed menu labeling regulations. In the same analysis, FDA also acknowledges that the costs of expanding menu labeling regulations to grocery stores are disproportionately higher. As a result, FDA identified an "Option 2" alternative to implement the menu labeling law, which would exclude grocery stores unless the majority of their business is derived from

restaurant-type foods. Expanding menu labeling to grocery stores would exceed \$1 billion in compliance costs. Unfortunately, FDA has not been willing to meet or discuss grocers' concerns with menu labeling, prompting the need for legislative action—H.R. 1249/S. 1756.

Relevant Legislation

H.R. 1249/S. 1756—The *Common Sense Nutrition Disclosure Act* is bipartisan legislation that clarifies the scope of menu labeling by only covering establishments where the majority of business is derived from restaurant-type food and provides compliance flexibility for restaurants and other establishments that cross that threshold.