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Supermarkets Support The Common Sense Nutrition Disclosure Act (H.R. 2017; S. 2217)

To Fix FDA Menu Labeling Regulations

FDA Final Menu Labeling Rule Impact on Supermarket Industry and Grocery Stores

On December 1, 2014, FDA published final regulations that expanded the scope of chain restaurant menu labeling requirements (Section 4205 of the Affordable Care Act) to thousands of grocery and general merchandise stores, and subjects them to enforcement by FDA, state/local officials, and potentially customers.

Although FDA was unwilling to engage with the supermarket industry prior to the release of the final menu labeling rule, FMI has been engaging with FDA since December 2014 to determine how the regulations apply in various grocery store settings. As part of that process, the supermarket industry has sought for FDA to address dozens of questions and concerns, some as basic as determining the distinction between a “restaurant-type food” and a grocery item; some more technical, such as font-size and sign placement requirements, and others more practical, such as liability and enforcement protection for food retailers making good-faith efforts, especially due to the lack of agency guidance. The lack of guidance, and prompting from Congress, eventually caused FDA to delay compliance with the menu labeling regulations until December 1, 2016. FDA finally released draft guidance on September 11, 2015, that did not adequately address supermarkets’ concerns and reinforced the rigidity of the Final Rule, compelling the need for legislation to allow some flexibility and lessen the confusion this rule has created for businesses and consumers alike.

Summary of Supermarket Industry Support for The Common Sense Nutrition Disclosure Act of 2015 (H.R. 2017; S. 2217)

- The supermarket industry supports the *Common Sense Nutrition Disclosure Act of 2015* (H.R. 2017; S. 2217) to maintain but address problems with applying the Food and Drug Administration’s (FDA’s) final regulations, “Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments” (79 FR 71155) at grocery stores.
- This legislation seeks to put the common sense back into the process. Most of the foods in a grocery store have not only calorie information, but also the NLEA Nutrition Facts panel which lists fat, sodium, carbohydrates and more. Many of the remaining items are sourced from the store. If cantaloupe, or any other fruit or vegetable, gets ripe in the produce department, they are cut up and used in the salad bar. These are not the issues Congress was trying to address when adopting the chain restaurant menu labeling legislation (as part of the Affordable Care Act).
- Supermarkets are at the forefront of nutrition, health and wellness initiatives, including the increasing role of nutritionists and dietitians in helping stores select and expand food offerings, such as gluten-free offerings, and use indicators, such as heart-healthy, low-sodium, and low-sugar to highlight “better for you” offerings but also in promoting healthier foods that are more convenient. This is all on top of supermarkets’ food safety and quality assurance personnel

focused on implementation of the FDA regulations regarding the Food Safety and Modernization Act (FSMA), compliance with requirements for Country of Origin Labeling, Ingredient Labeling and Allergen Labeling, Bioterrorism Recordkeeping, proposed updates to the Nutrition Facts panel, as well as Recall Notifications. Supermarkets also have safety and quality standards that go above and beyond these laws.

- Our concerns with mandating “menu labeling” at grocery stores is that FDA has designed these regulations for a format with limited offerings, standard portions, and, pre-printed menus. These are all things that take away creativity and reduce customer interest by driving standardized food.
- FDA’s menu labeling rule doesn’t fit a grocery store operation that carries, on average, over 36,000 food items that vary and alter the content of salad bars or other freshly made items. Store chefs and bakery-deli departments are empowered to offer items that reflect the local foods and tastes of their community. There are some items that may only sell at one or two stores, and while the same name may be listed, the ingredients or recipe may vary. Under FDA’s rules, these would all be considered “standard menu items” and regulated as such.
- Some of this variance is also the result of what’s available in the store, particularly in the produce area or meat case. If there is a surplus of cucumbers or berries, more of them will be used along the salad bar. Under FDA’s regulations, grocery stores still will need to perform nutritional analyses, to create and update signage, and to ensure these profiles are documented, maintained and available upon request. The shelf life on the items referenced is extremely short, so instead of risking an action by the FDA, stores would likely be forced to “shrink” the product.
- Many supermarkets have been considering using a prominent sign, menu board or menu adjacent to a salad bar or prepared foods area with itemized calorie counts. FDA’s rule and draft guidance, however, is requiring labeling of each individual item or matching along a window guard, which increases the likelihood for errors and consumer confusion in matching foods with labels since food items and their location along a food/salad bar frequently change.
- Due to the high variability and potential for human error that inevitably comes with freshly preparing foods, supermarkets would like the ability to take corrective actions before enforcement actions by FDA or by state and local health officials, who choose to enforce the menu labeling law.
- The Common Sense Nutrition Disclosure Act of 2015 (H.R. 2017; S. 2217) would maintain but modify FDA’s menu labeling regulations by:
 - Clarifying that the menu labeling law is intended for “standard menu items,” defined as those items prepared with uniformity and routinely included on a menu or menu board at 20 or more locations; not a food item that is sold at one or two stores.
 - Allowing for supermarkets to use a menu or menu board in a prepared foods area or next to a salad bar instead of individually labeling every item
 - Allowing an establishment to take corrective actions within 90-days prior to federal, state or municipal enforcement and protecting against frivolous class-actions; and
 - Providing flexibility within “reasonable basis” standards, in-store certifications, remote-ordering, multi-serving and variable items.
 - The Senate version, and going forward, the House version, of the Common Sense Nutrition Disclosure Act does not exclude retailers from the menu labeling regulations.