

Supermarket Industry Concerns and Questions - FDA Menu Labeling Regulation

1. **Public guidance** on these issues and questions are needed not only for stakeholder compliance but also for federal, state and municipal health officials to review, collaborate and adequately train inspectors to ensure consistent regulatory oversight.
2. **Additional time:** Allow for at least two years for compliance with FDA's final Menu Labeling Regulations, and at least one year for compliance with final FDA published guidance. Not only is this consistent with the timeframe allowed under the new regulations for vending machine compliance, it is also consistent with the compliance window granted by FDA in the context of the Nutrition Labeling and Education Act (NLEA).
3. **Items standardized at 20 or more locations rather than to those items served regularly at one location of a 20 store establishment:** Clarify that the menu labeling law is intended for "standard menu items," defined as a restaurant-type food that is routinely included on a menu or menu board or routinely offered as a self-service food or food on display at 20 or more locations. This ensures that the regulations apply only to those items that truly are standardized at 20 or more locations rather than applying to items sold on a regular basis at only one individual store.
4. **Foods labeled with Nutrition Facts, "Facts up Front," and "Clear on Calories" should be deemed in compliance:** The preamble states that for packaged foods, Nutrition Facts labels can be used to provide the written nutrition information. Does the term "packaged foods" include foods that are not subject to the packaged food labeling requirements in 101.9? All foods labeled with a Nutrition Facts panel or a voluntary labeling program that is compliant with the NLEA and includes information required under the menu labeling rule should be deemed in compliance with menu labeling regulations so long as the consumer can view the information before purchasing the item.
5. **Corrective Action:** FDA should provide a 90-day corrective action window for establishments found to be in violation of the menu labeling regulations. FDA should take no enforcement action, including the issuance of any public letter, for violations that are corrected within such 90-day period.
6. **Succinct statements in one prominent location:** Allow the "succinct statement" ("2,000 calories a day is used for general nutrition advice, but calorie needs vary" and additional nutrition information available upon request) to be posted in one prominent location in the store in the vicinity where the majority of covered foods are generally offered for sale rather than in each case or display location for items without a menu or menu board.
7. **Single sign at salad bar:** Allow for a sign above or at the end of the salad bar, listing calorie information for all of the standard food items including a succinct statement with the additional nutrition information available upon request, to satisfy the menu labeling requirements regardless of the length in feet of the salad bar.
8. **Additional Nutrition Information for grab-and-go items:** For grab-and-go items that retailers generate a label for already (yogurt parfaits, prepared sandwiches etc.), can a line be added to that label that lists

the calorie information without requiring additional signage? This is critical for “grab-and-go” items, such as sandwiches that may be made earlier in the day in a store deli and placed in a refrigerator case or a variable location in the store.

Deli Platters:

9. **Deli platters with Further Preparation Needed:** Sliced deli meats and cheeses are excluded on the basis that “there is an ordinary expectation that the consumer will further prepare those foods before consumption” e.g. by using the meat and cheese to make a sandwich. Can FDA clarify that this same logic also applies to deli platters with sliced cold cuts; olives, pickled vegetables, hummus, dips and other spreads, wedges of cheese and similar items which are eaten not alone, but require further preparation before consumption?
10. **Heating Cold Foods Constitutes Further Preparation:** Can FDA clarify that the logic used for ordinary expectation of further preparation extends to other items in the deli case including cold prepared foods which require the consumer to take an additional step (heating up) before they are ready for consumption?
11. **Further Preparation Bakery:** Can you also clarify that this would include bread, rolls and bagels as they are generally eaten as part of a sandwich or spread with butter or cream cheese or baked in an oven?
12. **Multi-Serving Items:** The rule lists specific rules for multiple-serving standard menu items. What foods are considered to be multiple-serving items?

Redundant Calorie Disclosure Requirements

13. **Calories on one display/panel:** Can FDA clarify that when a customer can simultaneously view a menu board including a standard menu item and/or a label or tag for the same item on display, only one calorie disclosure is required? For example, if a grab and go sandwich displays the calorie information on the label of the sandwich, along with the name and price, and a consumer can view that label prior to purchasing the item, the calorie disclosure would not be required on a sign or menu board highlighting the item or vice versa?

Recordkeeping

14. **Certification:** The regulations state that establishments must provide upon request by FDA a statement “signed and dated by a responsible individual employed at the covered establishment certifying that the covered establishment has taken reasonable steps to ensure that the preparation of the item adheres to the factors on which the nutrient values were determined. Can a regional manager with general knowledge of how food is prepared at the covered establishment qualify as the responsible individual for the purposes of this statement? Does the statement need to be kept at the covered establishment or could it be held at a corporate headquarters?
15. **Documentation:** The rules state that covered establishments must provide certain information to document their nutrient declaration within a reasonable period of time upon request from FDA, but do not state that such records must be maintained. Is it accurate that the documentation requirements in 101.11(c) are not recordkeeping requirements?

16. **Are any records required to be kept to document eligibility for any of the exemptions** (e.g. temporary menu items or daily specials)?
17. **Electronic signatures:** Is the electronic form of a signature acceptable for documentation/auditing purposes?

Menu and Menu Boards

18. **Moving Digital Menu Boards:** Are digital menu boards displaying calorie information for a standard menu item required to be “static” or can the menu move from one menu to a different menu every 30 seconds or some other similar configuration in order accommodate all items?

Enforcement

19. **Consistent Interpretation:** What kind of guidance and training is FDA going to provide to field personnel, as well as state and municipal health officials to ensure everyone has a consistent interpretation of the regulations and the goals of enforcement?
20. **Safe-Harbor for Using Accredited Nutritional Data Sources:** Provide food retailers a safe-harbor from federal, state and municipal enforcement actions, as well as from civil action, if an establishment relies on data contained in a nutritional data source and/or nutrient database accredited by (or references information from) a U.S. Government agency or other accredited body.
21. **Exclusion of single-ingredient or “minimally-processed” items:** Grocery, produce or bulk items that are otherwise not subject to the NLEA should not be subject to menu labeling regulations if the item remains a single-ingredient or is “minimally- processed.” “Minimally processed” would include processes that do not substantially alter the nutrient content of a food item, such as portioning or commingling of individual raw produce components (i.e., a salad) or bulk items.
22. **Transition Period:** Allow for a one-year menu labeling implementation transition period for businesses that add a 20th location.

Calorie Disclosure for Self-Serve and Foods-on-Display

23. **Font-size:** Allow font size for menu labeling calorie counts to be proportional to (not the same size as) the name and/or price of the food item consistent with other food labeling regulations, so the calorie count does not get confused with the price of the food item or obscure the name of the food. This would potentially allow for scale-labels to be used rather than having to buy new labeling equipment and software. For reference, final vending machine labeling regulations allow for calorie font size to be no smaller than 50% of the largest size of the brand name on the item’s package label.
24. **Fluid ounce abbreviation:** FDA states that for beverages, calorie declarations must be accompanied by the term “fluid ounces.” Is using the abbreviation “fl. oz.” acceptable under the rule?
25. **Calorie declaration on cups:** For fountain drinks and dispensed beverages, is providing the calorie declaration for the beverages on a self-service cup acceptable under the final rule?

Primary Writing

26. **Sign:** If a promotional sign for a sandwich includes both the name and price of the item, but the

customer could not order it without visiting a kiosk (which declares the calories), the promotional sign would not be considered a “primary writing” and would not need to declare calories.