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FOOD INDUSTRY ASSOCIATION EXECUTIVES

Day In Washington

Supermarkets Support the Common Sense Nutrition Disclosure Act (H.R. 2017; S. 2217) To Fix FDA Menu Labeling Regulations

Supermarket Industry Impact

On December 1, 2014, FDA published final regulations “Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments” (79 FR 71155) that expanded “menu labeling” requirements to thousands of grocery stores, and, as currently written, subjects them to \$1 billion in initial compliance costs and potential criminal penalties.

Concerns with mandating “menu labeling” at grocery stores stem from FDA writing these regulations for a chain restaurant format with limited offerings, standard portions, and pre-printed menus. The *Common Sense Nutrition Disclosure Act of 2015* ([H.R. 2017/S. 2217](#)) allows for some practicality for providing nutritional information to customers based on the different ways that foods are prepared and sold across various venues and formats.

Position

The supermarket industry supports enactment the *Common Sense Nutrition Disclosure Act of 2015* (H.R. 2017/S. 2217) to make FDA’s “menu labeling” regulations more workable in a grocery store setting. The U.S. House of Representatives passed H.R. 2017 in February with a [266-144 bipartisan vote](#). We are seeking bipartisan support to move this legislation forward in the Senate.

The *Common Sense Nutrition Disclosure Act of 2015* (H.R. 2017; S. 2217) maintains but modifies FDA’s menu labeling regulations by:

- Clarifying that the menu labeling requirements are applied to “standard menu items” that are standardized across several locations; not local foods sold at one or two stores or restaurants
- Allowing 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 enforcement and providing some liability protection in good-faith compliance efforts
- Providing some flexibility within “reasonable basis” standards, in-store certifications, remote-ordering, multi-serving and variable items
- Allowing online point-of-purchase nutritional information as a means for compliance for items that are normally ordered off-premises, such as delivery or catering

The bill does NOT exclude retailers from the menu labeling regulations, so all establishments are treated equitably. The House included one technical change to the “reasonable basis” provision, at the request of the National Restaurant Association, which was adopted with 300 votes in support in a Manager’s Amendment to H.R. 2017.

Background

On December 1, 2014, FDA published a 395-page final “chain restaurant menu labeling” rule that was expanded to grocery stores. Due to the rigidity of the regulations, the supermarket industry will incur \$1 billion in initial compliance costs and is subject to potential felonies for inadvertent human-error “mislabeling” violations under the Food, Drug & Cosmetic Act.

The supermarket industry has been attempting to work with FDA to address dozens of concerns and questions, some as basic as preserving local foods sold at a single location; some more technical, such as sign placement requirements in salad bars, 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. FDA’s delays in providing guidance caused Congress to delay enforcement of the menu labeling regulations until one-year after FDA publishes final guidance.

FDA finally released draft guidance on September 11, 2015 that reinforced the rigidity of the final rule, did not provide flexibility, and did not answer dozens of compliance-related questions put forward. FDA’s continued inability to address problems with the menu labeling regulations prompted the House of Representatives to move legislation (H.R. 2017) forward to inject some practicality and lessen the confusion this rule has created for businesses and consumers alike.

The *Common Sense Nutrition Disclosure Act of 2015* (H.R. 2017) preserves local foods or fresh items that may only be sold at one or two store locations. Individual stores have discretion 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 is listed, the ingredients or recipes may vary. Under FDA’s rules, these individualized foods are considered “standard menu items” and are regulated. The additional burden on individual stores and store employees of gathering nutrition information, creating and keeping new records, and developing labels for each store’s local foods harms their ability to offer truly fresh items or source from local purveyors and is leading to more standardized or pre-packaged food offerings.

H.R. 2017 allows for use of a menu board in prepared foods areas instead of individually labeling each item. Grocers are seeking to be allowed to use a prominent sign, menu board or menu adjacent to a salad bar or prepared foods area listing the foods and their calorie counts. FDA’s rule and draft guidance, however, requires labeling of each individual item or along a window guard, which increases the likelihood of errors and consumer confusion in matching foods with labels since these items and their location along a food/salad bar frequently change.

The legislation allows for corrective actions prior to enforcement and provides some liability protections. Due to the high variability and potential for human error that inevitably comes with freshly prepared foods, supermarkets would like the ability to take corrective actions before enforcement actions by FDA or by state/local health officials.

The *Common Sense Nutrition Disclosure Act of 2015* (H.R. 2017) is needed because FDA has not adopted these modifications. For several years, the supermarket industry has raised these concerns and proposals to FDA, but the final regulations and recent draft guidance failed to provide flexibility in these areas, indicating the agency will not address these issues.