



February 12, 2024

*Submitted electronically via regulations.gov*

Food and Drug Administration  
5630 Fishers Lane, Rm. 1061  
Rockville, MD 20852

**Re: Menu Labeling: Supplemental Guidance for Industry (Edition 2); Draft Guidance for Industry**

Dear Sir or Madam:

Thank you for the opportunity to provide comments on the Food and Drug Administration's (FDA) draft guidance for industry entitled *Menu Labeling: Supplemental Guidance for Industry (Edition 2)*. As the food industry association, FMI works with and on behalf of the entire industry to advance a safer, healthier, and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain — from retailers that sell to consumers, to producers that supply food and other products, as well as the wide variety of companies providing critical services — to amplify the collective work of the industry. More information about our organization is available at [www.FMI.org](http://www.FMI.org).

Menu Labeling remains an important topic for our member companies, and we appreciate the Agency addressing both the declaration of nutrition information on third-party platforms and added sugars.

**Declaration of Nutrition Information on Third-Party Platforms**

Section 5.8 of the supplemental guidance addresses the use of third-party platforms (TPPs), such as third-party online ordering websites and delivery applications. In its guidance, FDA recognizes that the use of TPPs has increased in recent years and encourages covered establishments to voluntarily provide nutrition information for the standard menu items. We agree that TPPs have become an increasingly important option for ordering and delivery applications, particularly in the post COVID environment where consumers increasingly seek out alternate ways to order and receive food. TPPs are also particularly important to smaller retailers who might not otherwise have the resources to implement and operate their own online ordering and delivery applications.

Our members are committed to providing the required nutrition information under the menu labeling rule. In some cases, TPPs provide calorie or nutrition information on a voluntary basis



where it is practicable to do so and where the TPP has determined consumers seek this information. In other instances, the nutrition information may not be available on the TPP but is available on the retailer's website. We recognize, however, that there are many situations where TPPs do not have access to this information, may not have platforms that easily accommodate the information, or may not be in a position to ensure the information remains accurate and up-to-date. As such, we support FDA's draft guidance encouraging calorie or other nutrition information to be provided on a voluntary basis, but not mandating that this information be present on TPPs. This position is consistent with the statutory provisions regarding menu labeling, which apply to restaurants and similar retail food establishments that are part of a chain with 20 or more "locations" doing business under the same name. 21 U.S.C. 343(q)(50(H)(i). FDA has defined the term "location" as meaning a fixed position or site, and TPP operators do not have 20 or more – or indeed, any – "locations" from which foods are purchased. 21 CFR 101.11(a). Further, the menu labeling rule requires additional written nutrition information to be available on the "premises" of the covered establishment; such premises do not exist for TPPs. 21 CFR 101.11(b)(2)(ii). As a result, the topic of calorie or nutrition information provided on TPPs is well suited to a voluntary approach.

### **Added Sugars**

Section 7.5 of the supplemental guidance addresses common questions regarding added sugars. More specifically, the guidance notes that although added sugars is a required nutrient in the Nutrition Facts label for packaged foods (21 CFR 101.9) it is not required nutrition information under the menu labeling requirements (21 CFR 101.11(b)(2)(ii)). The supplemental guidance encourages covered establishments to voluntarily disclose the gram amount of added sugars for standard menu items as part of their written nutrition information. FMI supports FDA's voluntary approach.

Retailers often utilize the Nutrition Facts panel for packaged foods as the means of compliance with the menu labeling requirements for certain pre-packaged grab-and-go items, like sandwiches, that are offered in the ready-to-eat sections of grocery stores. The FDA regulations recognize this as an appropriate way to comply with the menu labeling rule when the consumer can examine the package before purchase, and in those instances, the Nutrition Facts panel discloses added sugars because it is a required element of the nutrition information for packaged foods. See 21 CFR 101.11(b)(2)(iii)(C). In other instances, our members will voluntarily provide added sugars information when it is practical to do so – for example, where the relevant software accommodates the information, the information has been provided by the manufacturer and/or ingredient suppliers, and there is an opportunity to update the information to include added sugars. In many instances, however, it will not be practical to provide added sugars information as part of the "additional written nutrition information" because such information is often comprised of a significant volume of printed materials (e.g., printed binders) that are available for consumers upon request. See 21 CFR 101.11(b)(2)(ii). Printing new nutrition information that includes the added sugars content would involve a significant expenditure of time and resources that would most commonly be undertaken in response to a change in the regulation. Moreover, it could be challenging to obtain this information from

suppliers and manufacturers when it is not mandatory information. For these reasons, FMI supports FDA's approach of encouraging regulated entities to voluntarily include added sugars in the additional written nutrition information.

Our members are working hard to ensure that consumers are empowered to make healthy choices and have implemented a variety of resources including those related to added sugars consumption. Registered Dietitian Nutritionists (RDNs) work across the food industry sharing important information regarding nutritious food and beverage options. Retailers use in-store signage, shelf tags and brand specific labeling to help consumers identify choices relevant to their own personal needs and health goals to include products that are limited in carbohydrates and sugars. Industry-wide there has been an uptick over the past decade in the availability of products with no or reduced added sugars and/or smaller portion sizes to provide variety and choice for consumers. We believe all these steps ultimately contribute to helping consumers make informed dietary choices and limiting intake of added sugars in the diet.

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We greatly appreciate the opportunity to comment on menu labeling supplemental guidance labeling and are happy to discuss the above in greater detail should you have any questions.

Sincerely,



Dana Mullen Graber  
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