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FDA Publishes Supplemental Guidance on Menu Labeling for Chain Restaurants

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On November 7, the US Food and Drug Administration (FDA) published the latest in a series of [industry draft guidance documents](#) to help implement menu labeling and nutrient disclosure regulations applicable to chain restaurants (Draft Guidance). FDA guidance documents are advisory in nature and represent the views of the FDA at a given point in time. Accordingly, guidance is subject to change, but is useful for developing a compliance plan for retail establishments covered by the menu labeling regulations. Changes are usually incremental and based on agency experience and input from regulated industry members.

The FDA established a 60-day period for comments on the draft menu labeling and nutrient disclosure guidance. The comment period ends on January 6, 2018.

The current compliance date for menu labeling and nutrient disclosure regulations is May 7, 2018.

Implementation of federal menu labeling and nutrient disclosures by chain restaurants is a study in modern American political and administrative processes. For those who already tried to comply with the formal FDA regulations and prior guidance, an explanatory note about delays in the administrative process appears at the end of this post.

Two sections of the Draft Guidance explicitly address alcohol beverages.

- Guidance is offered for beer lists on menus and the discussion has broader application to wine and spirits products and cocktails that are standard menu items on chain restaurant menus.
- Sources of nutrient information for beer, wine and spirits are also discussed to provide an alternative to expensive laboratory testing for each brand that a manufacturer offers.

The Draft Guidance also:

- Includes several plain-language explanations of key terms in FDA regulations with useful distinctions between regular menu items and season or special items;
- Displays a number of graphics designed to assist retailers with standardized formats to communicate calorie content of various foods to consumers and to distinguish menus from marketing materials;
- Directs manufacturers and retailers to reliable sources and methods to prepare and display compliant nutrient disclosures; and
- Provides information on presentation of mandatory standard menu notices alerting consumers to the federal government's recommended 2,000 calorie diet and availability of nutritional information for standard menu items upon request to a server or manager at a retail establishment.

The FDA guidance and the formal regulations use subjective terms about legibility (e.g., contrasting, clear and conspicuous). Those terms aim to ensure that information is consumer-friendly, but they could lead to nuisance complaints from regulators. FDA regional personnel and local inspectors under contract with the FDA will monitor compliance with menu labeling regulations. Since chains will, by nature, have locations in multiple jurisdictions, consistency in enforcement poses a challenge to industry and government.

The logo for McDermott Will & Emery, featuring the firm's name in a green, sans-serif font.

Article By [McDermott Will & Emery](#)
[Arthur J. DeCelle](#) Alcohol Law Advisor

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To mitigate regulatory risks, a conservative approach is advisable to mandatory disclosures. All aspects of calorie and nutrient disclosure should be reviewed by counsel or a knowledgeable compliance professional. The review should start with the manner used to ascertain calories and nutrients and continue through preparation and publication of new and easy-to-read menus and nutrient disclosures. While the regulations will inevitably lead to a standardized portion of chain menus, the Draft Guidance does not inhibit traditional point-of-sale marketing materials, graphics and other creative elements in a menu or associated marketing materials.

Why has menu labeling taken so long?

- Menu labeling and nutritional disclosure requirements for chain restaurants are mandated by Congress in the Affordable Care Act of 2010 (better known as Obamacare).
- A four-year rulemaking process on menu labeling ended with publication of a final rule on December 1, 2014. That rule is unchanged as of November 2017, and is found at 21 CFR 101.11.
- A protracted debate occurred over the complexity of the rule and practical issues for food retailers who are responsible for compliance.
- In 2015, Congress enacted an appropriations bill, which included a “policy rider” ordering the FDA to not to spend money on implementation and enforcement of the final rule until one-year after publication of a guidance document. Because appropriations bills deal with funding and not substantive policy, Congress provided no additional guidance to the FDA to clarify issues raised in the rulemaking and public controversies surrounding menu labeling.
- The FDA published a “final guidance document” on May 5, 2016, with a new compliance date of May 5, 2017. Controversy continued, and the FDA extended the implementation date again to May 7, 2018.
- The November 2017 draft FDA guidance document discussed above could be revised again following the 60-day comment period.
- The compliance date remains May 7, 2018 unless extended again by the FDA or delayed by additional Congressional action.

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