



Consumer Federation of America

September 7, 2010

The Division of Dockets Management
HFA-305
Food and Drug Administration
5630 Fishers Lane, Room 1061
Rockville, MD 2085

Re: Docket No. FDA-2010-N-0298

To Whom It May Concern:

The Consumer Federation of America (CFA) appreciates the opportunity to respond to the Food and Drug Administration's (FDA) request for comments on the national menu labeling provisions of the Patient Protection and Affordable Care Act ("Affordable Care Act").

CFA is a non-profit association of some 280 organizations, with a combined membership of over 50 million Americans. Member organizations include local, state, and national consumer advocacy groups, senior citizen associations, consumer cooperatives, trade unions and anti-hunger and food safety organizations. Since its founding in 1968, CFA has worked to advance the interest of American consumers through research, education and advocacy. CFA's Food Policy Institute was created in 1999 and engages in research, education and advocacy on food and agricultural policy, agricultural biotechnology, food safety and nutrition.

Menu Labeling Is An Important Part Of The Care Act's Public Health Initiative

CFA agrees with Congress that healthy eating is a cornerstone of public health. As such, CFA strongly supports national menu labeling and commends the FDA for committing to carrying out the program mandated by the Affordable Care Act. The next step is ensuring that FDA regulations give effect to the purpose and intent of Section 4205, to reduce diet-related public health issues by empowering consumers to make healthy food choices.

As the 2006 Menu Education and Labeling Act recognized, menu labeling is needed for several reasons. Primarily, consumers have a right to information that will enable them to protect their health and well-being. However, half of large chain restaurants do not provide any nutrition information to consumers,¹ making it impossible for eaters to

¹ Center for Science in the Public Interest, "Nutrition Labeling at Fast-Food and Chain Restaurants," <http://www.cspinet.org/menulabeling/why.pdf>.

compare food choices. This lack of informed decision making is compounded by the frequency with which Americans dine at restaurants – up to four times per week, for the average American.² Plus, when eating out, people eat more saturated fat and fewer nutrients, and children eat almost twice as many calories when they eat out compared to eating at home.³ Hence, as studies show, providing nutrition information to restaurant patrons can help them make healthier food choices.⁴

Menu Labeling Is Best For Consumers and Restaurants

Perhaps most importantly, both consumers and restaurants agree that menu labeling will be beneficial. As the FDA’s own focus groups indicated, consumers “reacted favorably” to the idea of menu labeling.⁵ National polls also demonstrate that patrons favor menu labeling because it will “help consumers to make more informed choices and would encourage businesses to take on greater responsibility for the nutritional quality of foods they serve.”⁶ Additionally, the selection of healthier menu options can potentially increase the amount of healthy foods offered in restaurants and retail establishments, reinforcing Congress’s commitment to improving public health.⁷

The National Restaurant Association likewise recognizes “the importance of providing consumers with the information they want and need,” and agrees that menu labeling “is a win for consumers and restaurateurs.”⁸ According to the Robert Wood Johnson Foundation’s *Healthy Eating Research*, “researchers have not found evidence to indicate that menu labeling will reduce the revenues of away-from-home food establishments.”⁹ Thus, both consumers and restaurants will benefit from a national menu labeling system.

Additional Nutrition Information Should Be Easily Available and Understandable

Currently, the Affordable Care Act requires that establishments provide additional nutrition information to the consumer upon request and have it available on the premises “in a written form.”¹⁰ CFA urges the FDA to remain mindful of the fact that this information is only as useful as the manner and format in which it is delivered. Presenting information in a simple, easily-understood format with which consumers are familiar will ensure that the information is conveyed effectively; this in turn ensures that consumers are empowered to make informed food purchases. Likewise, the information must be freely available and accessible. The Affordable Care Act requires that the menu or menu

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Healthy Eating Research (Robert Wood Johnson Foundation), Menu Labeling: Does Providing Nutrition Information at the Point of Purchase Affect Consumer Behavior?, June 2009 (available at <http://www.oregon.gov/DHS/ph/menu/pubs.shtml>).

⁶ *Id.*

⁷ See Healthy Eating Research, *supra* note 5 (explaining that when provided with nutrition information, consumers were less likely to purchase foods higher in calories or fat).

⁸ News Release, National Restaurant Association, National Restaurant Association Says Nutrition Information Provision Is Win for Consumers and Restaurants (Mar. 22, 2010) (available at <http://www.restaurant.org/pressroom/pressrelease/?id=1910>).

⁹ *Id.*

¹⁰ Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. § 4205 (A)(ii)(iii).

board display a “prominent, clear, and conspicuous statement regarding the availability” of additional nutrition information,¹¹ but FDA must affirmatively require the information to be *accessible*, not merely *available*. Additional information is of little use to consumers if it is difficult or time-consuming to obtain; for it to be useful, information must be provided in-store, at the point of purchase. Hence, referring consumers to websites or brochures or providing nutrition information on tray liners or food packaging has proven ineffective at informing consumers when no other nutrition information is provided.¹² Though providing nutrition information through websites, brochures, tray liners, or packaging will be more effective when combined with menu labeling, FDA must still ensure that whatever means chosen to convey information does so effectively. Therefore, CFA urges FDA to ensure by regulation that additional nutrition information is easily available, accessible, and understandable.

The Care Act Calls For Stringent FDA Regulations

CFA also encourages FDA to err on the side of applicability when interpreting the exemptions for items not listed on the menu board, specials and custom orders, and customary market test foods. The terms of the Affordable Care Act reflect Congress’ intention to have its provisions apply in most instances; hence, the exemptions listed are fairly limited.¹³ Even so, the Act is more generous to the restaurant industry than are some state menu labeling laws. In Massachusetts, for instance, exemptions are limited to items that are on the menu for 30 days or less in a calendar year, as opposed to the 60 days per calendar year granted in the Affordable Care Act.¹⁴ Thus, when effectuating the terms of the Act through regulations, FDA must be sure to uphold the integrity of the Act’s language by limiting the instances in which the Act’s provisions do not apply.

FDA Regulations Should Reflect Consumer Preference And Advancements In Public Health

The current provisions of the Affordable Care Act require the disclosure of caloric content and supplemental written disclosure of total fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, and total protein. While the amount of information provided is commendable, other information such as trans fats is still not required to be disclosed. However, the Affordable Care Act gives the FDA the authority to require disclosure of other nutrients to “assist consumers in maintaining healthy dietary practices.”¹⁵ An effective menu labeling scheme should provide consumers with the most information possible to facilitate informed choices. Accordingly, CFA encourages the FDA to seek public comment on what additional nutrients should be disclosed and to reevaluate the content of menu labels as necessary to reflect developments in nutrition science and public health.

Sincerely,

¹¹ *Id.* § 4205 (A)(ii)(iv).

¹² Center for Science in the Public Interest, *supra* note 1.

¹³ *See* H.R. 3590 § 4205 (A)(vii).

¹⁴ *Compare* 105 Mass. Code Regs. 590.009 (G)(1)(a) *with* H.R. 3590 § 4205 (A)(vii).

¹⁵ H.R. 3590 § 4205 (A)(vi).

A handwritten signature in black ink, appearing to read "Chris Waldrop". The signature is fluid and cursive, with the first name "Chris" and last name "Waldrop" clearly distinguishable.

Chris Waldrop
Director, Food Policy Institute