MY MUFFIN HAS HOW MANY CALORIES??? UNDERSTANDING THE NEW FDA MENU LABELING REQUIREMENT

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Given the option, many would choose to live in blissful ignorance regarding the number of calories in our every bite; however, the FDA thinks we should know. According to the FDA, we consume approximately one third of our daily calories outside of our homes. Based upon the belief that providing calorie content will help consumers make healthier decisions, the FDA enacted a menu labeling requirement (21 CFR 101.11) which will go into effect on December 1, 2016.

FDA Labeling Requirement

The regulation requires that covered retailers clearly and prominently display calorie content on their menus. Although additional nutrition content need not appear on the menu itself, retailers must post a statement in a prominent and conspicuous location indicating that additional nutrition information is available upon request.

The regulation proscribes what additional content must be available. While the regulation does not specify the manner in which a retailer should determine calorie and other nutrition content, there must be a "reasonable basis" for making such determinations. Retailers relying on third party vendors for such information should take extra caution to protect themselves through carefully

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drafted vendor agreements.

Menu Labeling Requirement: Restaurant-Type Food

The Menu Labeling Requirement exempts small businesses and applies only to certain kinds of foods sold by certain kinds of retailers.

Specifically, the regulation covers the sale of "restaurant-type" food that is sold by restaurants or similar retail food establishments that are:

- (1) part of a chain of 20 or more locations;
- (2) doing business under the same name; and
- (3) offering for sale substantially the same menu items.

"Restaurant-type" food is defined as food that is generally eaten on the premises, or enjoyed shortly thereafter. However, retailers should use caution in assessing whether the rule applies as it is broader than it might appear on the surface.

Menu Labeling Requirements

The following are examples of restaurant-type food for which a menu label is required:

- prepared foods sold at a grocery salad bar or deli case,
- hot dogs and other prepared items sold at a gas station or convenience store,
- popcorn and nachos sold at a movie theatre,
- muffins and other baked goods sold at a coffee shop, and
- pizza sold for pick up or delivery.

In many cases, beverages, both alcoholic and non-alcoholic, apply as well. Although some retailers already voluntarily provide calorie content, the regulation no doubt will impose a heavy burden on many. Among other challenges, the Menu Labeling Requirement may limit a retailer's ability to change its menu frequently.

If you're not sure whether the rule applies to your business, now is the time to find out and begin taking steps towards compliance. Rest assured, you still have some time -- the FDA has said it will not enforce the rule until May 5, 2017.

Although not the subject of this post, please note that a corollary regulation was enacted requiring the posting of calorie content for foods sold in vending machines.

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