[ADD COMPANY LETTERHEAD]

May 30, 2017

Anna K. Abrams

Deputy Commissioner for Policy, Planning, Legislation, and Analysis

Food and Drug Administration

10903 New Hampshire Avenue,

Room 2335,

Silver Spring, MD 20993

**RE: Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Extension of Compliance Date; Request for Comments, FDA-2011-F-0172**

Dear Deputy Commissioner Abrams,

On behalf of Company, I write to express my concerns with the final rule from the U.S. Department of Health and Human Services’ Food and Drug Administration (FDA), which requires retail food establishments to disclose certain nutrition information on menus.[[1]](#footnote-1) Company supports the goals of the menu labeling regulations and believes it is important to provide consumers with nutrition information. Nevertheless, the FDA’s menu-labeling rule was designed for chain-restaurants, not convenience stores, and would impose significant burdens on my business, with minimal benefit to consumers. Therefore, Company respectfully urges FDA to amend the rule to provide greater flexibility for different business models.

**I. Introduction to Company**

[INSERT BACKGROUND ON YOU AND YOUR COMPANY:

How many stores do you own? Are you a family owned business? Are you a franchisee?

How many people do you employee in your stores?

Do you operate in rural, urban, or suburban areas?

Do you sell self-service foods like those found in a buffet or a grab-and-go display?]

We pride ourselves on selling products our customers want to buy, and offering those products for sale in a manner that is convenient for them in terms of both location and hours of service. We offer a variety of fresh and prepared foods including, list examples. We are not, however, a chain restaurant—and our business model is different from a chain restaurant’s business model. For example, unlike restaurants, food service is not my primary source of revenue.

**II. Concerns with FDA’s Menu-Labeling Rule**

We have five main concerns with the menu labeling rules: (1) the rules do not distinguish between what is a menu and what is an advertisement, (2) the rules would require us to post menus in multiple locations throughout our stores adding to costs and customer confusion, (3) the rules do not recognize the natural nutritional variations that will occur with prepared food items, (4) the certification requirements in the rule carry criminal penalties which are unreasonable, and (5) the rules do not provide retailers with the ability to correct mistakes in nutrition labeling.

**1. The Rules Should Differentiate Between Menus and Advertisements.**

Under the current rules, it is unclear what counts as a menu, which must have calorie information, and an advertisement, which does not. In our stores, marketing pieces for special food deals change periodically and often appear throughout the store, in store windows, on shelves, on sidewalk boards, and on gas pumps. All of these marketing pieces regularly include names, images, and prices of standard food items. For example, [Provide a specific example of an advertisement that features an image and price of a food item in your store that you don’t think is a menu.]

Our advertisements change on a frequent basis to keep up with special pricing and product offerings and combinations. Requiring calorie counts on advertisements would be very costly due to the frequency of changes and the large numbers of such pieces. FDA should revise the menu labeling rules to clarify that advertisements are not menus and that the menu is only one thing per store – for example, the board(s) at the point of sale (or printed menu for sit-down restaurants). Without a clarification, companies cannot be certain which materials do and do not require calorie information and will have to invest significant resources placing calorie information on simple marketing materials that will provide no health benefits to consumers.

**2. The Rules Requires Menus to be Posted EVERYWHERE Self-Service Food and Food on Display is offered.**

As currently written, the FDA’s rules will require businesses like ours to post calories for standard menu items on menus or menu boards or, for self-service items and foods on display, on signs adjacent to the items. Today, we sell self-service items – such as sodas and coffee – as well as food on display – such as hot-dogs and prepared sandwiches. In fact, we offer approximately [# number of] self-service and food on display items in each of our stores –and those items are offered to consumers at many locations throughout the stores. Because the rules would require calorie information everywhere consumers “make a decision to purchase food,” we will be required to put menus virtually *everywhere*. This will not only create confusion for consumers, but it will be incredibly costly. We estimate that we will need to post [# - of separate menus would you need to add in your store to display a menu board with calorie counts next to each self-service item] menus around our store for self-service items and other foods on display. FDA should revise this rule to allow retailers to offer nutritional information on one central menu board or menu where consumers can access nutritional information.

**3. The Rules Should Provide Flexibility for Natural Nutritional Variation**

The agency’s rules do not recognize that there may be naturally occurring nutritional variation in prepared food items. For example, if a store sells chicken sandwiches or hamburgers, the chicken and the patties will not be identical in size and shape and will not, therefore, have identical calorie counts. Moreover, it is not possible to make every prepared food exactly the same way. This is a real concern for us as we sell many prepared food items, such as list examples of prepared food items.

FDA should explicitly recognize in the rule that food items naturally vary in calorie counts and other nutrition values. This occurs due to variations in the base food item (e.g. different size chicken parts and other ingredients) and normal preparation variations (e.g. differences in cooking time, normal variations in amounts of different ingredients, etc.). The rule should note that these differences will occur no matter how regimented any food preparation process is and such differences should not result in violations of the rule.

**4. Non-Compliance Should NOT Result in Criminal Penalties**

If the rules go into effect as finalized, we will be required to certify to FDA stating that the way the store has prepared the food is in line with the calorie information we provided. Failure to do this or improper certification – because of an error in calorie count or if a store clerk puts extra cheese on a sandwich – may result in criminal penalties.

While it is important to provide consumers with nutritional information, it is inappropriate for errors in the nutritional information provided to result in criminal penalties. It is simply not possible for food items to be prepared with such precision that they have the same calorie counts every time so the certification may be impossible to meet. And, many of my employees are young adults (in fact, ### of our store-level workers are between the ages of 16-24) – having criminal liability turn on whether they put together a food item precisely the same way every time is ludicrous. Civil penalties are more than sufficient to incentivize compliance with these rules. Nutrition labeling is just not a criminal issue.

**5. The Rules Do Not Provide Retailers with the Ability to Fix Mistakes**

Currently, there is no flexibility in the rules to allow for retailers to adjust or fix calorie information that may be erroneous or incorrectly labeled. FDA should update its regulations to provide a grace period whereby retailers can adjust calorie information accordingly before FDA initiates or imposes a penalty. If the goal of the menu labeling rules is to provide consumers with helpful nutrition information, the rule should be structured to encourage and enable retailers to provide such information.

As written, the FDA’s menu-labeling rules will be exceedingly difficult for convenience stores like Company to comply with, and would subject retailers to potentially harsh—including criminal—penalties even if they make good faith efforts to comply. We urge the FDA to revise the final rule to accommodate the concerns referenced above.

Thank you for your consideration of my concerns, and please let me know if Company can provide any additional information.

Sincerely,

[INSERT NAME]

1. Food and Drug Administration, Final Rule, *Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Calorie Labeling of Articles of Food in Vending Machines*, 79 Fed. Reg. 71156 (Dec. 1, 2014), https://www.gpo.gov/fdsys/pkg/FR-2014-12-01/pdf/2014-27833.pdf. [↑](#footnote-ref-1)