ARNOLD & PORTER LLP

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HOUSE PASSES NATIONWIDE MENU LABELING LEGISLATION

Little noted in media coverage of the US House of Representatives' passage earlier this week of the Affordable Health Care for America Act was a provision requiring certain restaurants (including "similar retail food establishments") to list the amount of calories and other nutritional values for standard menu items.[1] The legislation, once enacted, would set uniform, national standards for menu labeling, preempting state and local laws whose differences have reportedly burdened restaurants and confused consumers.

REQUIREMENTS FOR RESTAURANTS

The legislation, which would apply to restaurants with 20 or more locations doing business under the same name, would impose two main requirements. First, restaurants must list calorie information on menus and menu boards for all standard items.[2] Second, restaurants must make available in writing, upon request, the amount of fat, saturated fat, cholesterol, sodium, total carbohydrates, complex carbohydrates, sugars, dietary fiber, and protein in standard menu items.[3] In addition, menus and menu boards must state that all of the above information is available upon request,[4] and must state the recommended daily intake of calories.[5]

The legislation would require restaurants to have a "reasonable basis" for the nutrition information provided.[6] This standard—currently applicable to voluntary nutrient content claims made by restaurants—is set forth in regulations under the Nutrition Labeling and Education Act (NLEA).[7] It allows a restaurant to obtain nutrient information for menu items from sources such as recipes, nutrient databases, and analytical testing. To show a "reasonable basis," a restaurant must show that it used a reasonable method to obtain its nutrient values, and also that it took "reasonable steps" to ensure that the method of preparation of the food was consistent with that basis.[8]

PREEMPTION OF DIFFERENT STATE AND LOCAL LAWS

In a provision sought by the restaurant industry, the required disclosures and "reasonable basis" compliance standard would be uniform nationwide. Currently,

1 The bill also requires certain vending machines to display calorie values for food items.
2 *See* H.R. 3962 § 2572(b)(H)(ii)(I)(aa).
3 *Id.* §§ 2572(a)(1)-(2); 2572(b)(H)(ii)(III)
4 *Id.* § (b)(H)(ii)(IV),
5 *Id.* § 2572(b)(H)(ii)(I)(bb).
6 *Id.* § (b)(H)(iv).
7 21 C.F.R. § 101.13(q)(5)(ii); 21 C.F.R. § 101.10.
8 *See* 21 C.F.R. § 101.13(q)(5)(ii).

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restaurants are subject to a multitude of state and local nutrition labeling laws because the NLEA preemption provision specifically exempts restaurants from its scope.[9] More than a dozen jurisdictions have specific requirements for nutritional labeling in restaurants, with bills pending in almost 20 more jurisdictions.

The new federal legislation modifies the NLEA preemption provision to provide that "no state . . . may establish . . . any requirement for nutrition labeling of food that is not identical to the requirement of . . . this title*, except that this paragraph does not apply to food that is offered for sale in a restaurant or similar retail food establishment that is not part of a chain with 20 or more locations . . . ."*).[10] Thus, to be exact, the new legislation narrows the exemption of restaurants from NLEA preemption so that the exemption applies only to restaurants with fewer than 20 locations.[11]

FDA REGULATIONS

The proposed law is silent on when restaurants will be required to comply, but it requires the US Food and Drug Administration (FDA) to propose implementing regulations within a year.[12] Among other things, those regulations are required to specify the "format and manner of the nutrient content disclosure requirements."[13] Thus, it is unlikely that restaurants will be required to comply with the law prior to promulgation of the regulations by FDA. Moreover, if history is a guide, the proposed regulations themselves will contain a proposed date by which restaurants must comply. This is the approach that was taken when the original regulations implementing the NLEA were promulgated.

The House's version of healthcare legislation is likely to face stiff opposition in the Senate on other grounds, and if it does pass it would likely be in altered form. Should the menu labeling provisions become law, however, restaurants will need to assess the meaning of the requirements and possible methods of compliance.

Arnold & Porter LLP has significant experience representing restaurants and others in the hospitality industry on nutritional labeling requirements. Attorneys in our San Francisco and New York offices have represented restaurant industry associations in challenging local menu ordinances and regularly advise restaurants regarding compliance and enforcement issues with respect to state and local menu labeling and related requirements. If you would like more information about any of the matters discussed in this advisory, please contact your Arnold & Porter attorney or:

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9 *See* 21 U.S.C. § 343-1(a)(4).

10 H.R. 3962 § 2572(c) (emphasis added).

11 The preemption analysis is actually somewhat more complex. The NLEA currently preempts state laws regulating "nutrient content claims," *see* 21 U.S.C. § 343-1(a)(5), but does not preempt state laws requiring disclosure of "nutrition information" on menus. *See* 21 U.S.C. § 343-1(a)(4). Courts have found that a restaurant makes a "nutrient content claim" when it *voluntarily* discloses the amount of nutrients present in a menu item, but provides "nutrition information" when such a disclosure is *required* by state law. *See New York State Rest. Ass'n* v. *New York City Bd. of Health,* 556 F.3d 114, 130-31 (2d Cir. 2009).Thus, the Affordable Health Care for America Act has two effects. First, it triggers the preemption provision in 21 U.S.C. § 343-1(a)(4) by making menu labeling mandatory (and thus requiring restaurants to provide "nutrition information.") Second, it modifies that preemption provision—which had previously not applied to restaurants at all—by stating that it applies to restaurants with 20 or more locations.

12 *Id.* § (b)(H)(x)(I).

13 *Id.* § (b)(H)(x)(II)(bb).