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MEMORANDUM

From: Joseph A. Levitt
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Re: FDA Issues Finale Rule on Front-of-Pack Calorie Disclosures Used for Vending Machine Labeling Compliance

The Food and Drug Administration (FDA) issued a final rule to revise the type size requirements for front-of-pack (FOP) calorie declarations that are used to comply with the vending machine calorie labeling requirements.^{1/} The final rule requires such calorie declarations to be at least 150% the size of the net quantity of contents statement as required under 21 C.F.R. § 101.7(i) (i.e., 1.5 x the size of the net weight). FDA proposed this change to the type size requirements in July 2018, after industry expressed concerns that the previous type size requirement for FOP calorie declarations – at least 50% of the size of the largest printed matter on the label^{2/} – was impractical, needlessly burdensome, and would disrupt existing voluntary industry front-of-pack nutrition labeling programs. The compliance date for the new font size requirement is July 1, 2021. FDA also announced it will continue its enforcement discretion with respect to the vending machine labeling requirements as applied to gums, mints, and roll candy products sold in glass-front machines in packages that are too small to bear FOP labeling.

FOP Calorie Declarations

The requirement that FOP calorie declarations be at least 150% of the net weight statement applies only when the FOP calorie declaration is used to comply with the vending machine labeling rule, such as when consumers can view the packaged food through a glass-front vending machine. It would not apply when the vending machine operator otherwise provides calorie information in compliance with the vending machine labeling rule or when the article of food is not sold in covered vending machines.

By way of brief background, the vending machine labeling final rule requires vending machine operators that own or operate 20 or more vending machines (or that voluntarily register with FDA to be subject to the final rule) to provide calorie information for certain articles of food sold from vending machines. Vending machine operators do not, however, need to provide such calorie information if the purchaser can view calorie information on the front of the package before making his or her selection. Although the vending machine labeling rule applies to vending machine operators, and

^{1/} 84 Fed. Reg. 57603 (October 25, 2019).
^{2/} 21 C.F.R. § 101.8(b)(2).

not directly to food manufacturers, as a practical matter it may be more efficient for the food manufacturer to provide visible nutrition information via a FOP calorie declaration when the food is sold from a glass-front vending machine. The final rule specifies the type size requirement for this “visible nutrition information” exemption. FDA also clarified that only the numerical value indicating the total calories, rather than the word “calories,” is subject to the final rule's type size requirements.

FDA made a minor adjustment to the proposed rule to clarify that the minimum type size requirement is 150% of the required net contents statement, rather than 150% of the net contents statement as it appears on the label. FDA also noted in the preamble to the final rule that vending machine operators making use of this “visible nutrition information” exemption must still comply with the rule's other requirements, such as requirements that the prospective purchaser can view the total number of calories for the article of food as sold at the point of purchase (i.e., ensuring that coils or the positioning of the food does not prevent consumers from viewing the FOP labeling information).

FDA had initially proposed that the compliance date for the final rule would be January 1, 2020, the same compliance date as for the new nutrition labeling requirements for large manufacturers. In the final rule, however, FDA chose to extend the compliance date until July 1, 2021 in order to allow manufacturers time to revise or update their labeling and “move any existing products through distribution chains before the compliance date.”

Continued Enforcement Discretion for Gums, Mints and Roll Candy Sold in Glass-Front Machines That Are Too Small for FOP Labeling

In the preamble to the proposed rule, FDA announced its intention to exercise enforcement discretion at least until January 1, 2020 with respect to the vending machine labeling requirements as applied to gums, mints, and roll candy products sold in glass-front machines in packages that are too small to bear FOP labeling, to allow for further consideration of the issue. In the final rule, FDA acknowledged that these products “tend to be sold in small packages that do not lend themselves to FOP labeling and are often located or placed in a small space in glass-front machines that may make it difficult to add calorie disclosure signage.” Accordingly, FDA announced in the final rule that it will continue to exercise enforcement discretion for these products on an on-going basis.

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We will continue to monitor FDA's implementation of the vending machine labeling requirements. Please contact us if you have any questions regarding this or any other matter.