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## Health Care Reform: What Chain Restaurants and Vending Machine Operators Need to Know

President Obama recently signed into law the Patient Protection and Affordable Care Act ("PPACA") and the Health Care and Education Reconciliation Act of 2010, which amends the PPACA. These two acts will significantly change the health care landscape in the United States.

In particular, this new legislation requires chain restaurants and vending machine operators to disclose to consumers certain nutritional information about the food and beverage items they market and sell. In addition to imposing disclosure requirements on chain restaurants and vending machine operators, the legislation authorizes the Secretary of the U.S. Department of Health and Human Services ("HHS") to promulgate regulations to implement the legislation. Of note, the Secretary is authorized to extend the legislation's disclosure requirement to other nutrients. The legislation will not go into effect until the regulations are put in place by HHS, which is tasked with promulgating proposed regulations within the year.

The law narrowly preempts state and local laws regulating these types of nutritional information disclosures. But the legislation's preemption clause is not as broad as it might seem at first blush. Accordingly, the law could very well increase covered entities' risk of liability going forward.

### **I. Important New Provisions**

#### **A. Who is Affected?**

These nutritional disclosure requirements apply to standard menu items at restaurants or similar retail food establishments that are part of a chain (20 or more) that offers substantially the same menu ("chain restaurants"). The disclosure requirements also apply to vending machine operators that own or operate 20 or more vending machines.

#### **B. Information Required to be Disclosed**

Chain restaurants must, in a "clear and conspicuous manner," disclose information in the following locations:

- **Menus:** Menus must list the number of calories in each item and include a statement regarding suggested caloric intake prominently on the menu. The suggested caloric intake statement must be designed to enable consumers to understand the context and significance of the calorie counts posted on the menu.
- **Menu Boards:** Menu boards (including drive-through menus) must include the same calorie count and suggested caloric intake information.
- **Written Material:** The menu or menu board must inform consumers that the above information, as well as the nutrition information typically found on the "Nutrition Facts" label on packaged foods, is available in written form on the premises.

→ **Vending Machines:** If a vending machine does not provide visible nutritional information to a prospective purchaser (by, for example, arranging the products in the machine so that the Nutrition Facts Panel is visible), then the operator must provide a sign next to the food or selection button that includes a clear and conspicuous statement of the calorie count.

### C. Self-Service Food and Food on Display

A sign listing calories per displayed food item or per serving must be displayed for:

- Food sold at a salad bar, buffet line, cafeteria line, etc.;
- Self-service beverages; and
- Food that is on display and visible to customers.

### D. Reasonable Basis for Nutrient Content

Restaurants are given some flexibility in determining calorie content; they must be able to justify their disclosures by reference to nutrient databases, cookbooks, laboratory analyses or other reasonable means to be prescribed by federal regulations. This protects restaurants from claims based on the inevitable variability of calorie content in any given serving.

### E. Menu Variability and Combination Meals

The regulations will determine how nutrient content for menu items that come in different flavors, varieties or combinations, but which are listed

as a single menu item (e.g., pizza with different toppings, different flavors of ice cream and children's combo meals), are to be disclosed.

### F. Regulators Granted Power to Expand Disclosure Requirements

Importantly, the law grants federal regulators the discretion to require disclosures of additional nutrients if doing so would assist consumers in maintaining a healthy dietary practice.

### G. Exceptions

The above disclosures do not apply to: Items not listed on the menu or menu board (e.g., condiments);

- Daily specials or temporary menu items (appearing for less than 60 days);
- Custom orders; or
- Food that is part of a customary market test (appearing for less than 90 days).

### H. Voluntary Provision of Nutrition Information

If a restaurant or vending machine operator is not subject to these disclosures, it nevertheless may elect to disclose nutritional information. Restaurants making such voluntary disclosures, however, must register with the federal government.

### II. Impressions and Concerns

The new disclosure requirements offer national uniformity in an area that has been subject to a proliferation of state and local regulations. A single common standard, in contrast to the existing patchwork of state and local

requirements, should be welcomed by restaurants and consumers alike.

The extent to which the legislation alters the relationship between restaurants and consumers, however, cannot be overstated. We have moved from a market where restaurants have competed primarily based on taste and price, to a market where restaurants will be compelled to compete based on the relative healthiness of their food. Anecdotal evidence from New York, which has imposed similar requirements since 2007, indicates that restaurants are more aggressively marketing their lower-calorie items.

In this new and evolving environment, restaurants should remain mindful of federal regulations regarding nutrient content claims. Restaurant operators should be aware that the new disclosure law does not meaningfully expand existing preemption provisions. Courts have not definitively resolved the scope of existing preemption provisions, but, in general, consumers can sue under permissive state consumer fraud statutes so long as they do not seek to impose standards that are different from the relevant federal standard. Therefore an overly aggressive claim about nutrient content can create significant liability risk. Even a minor deviation from federal standards can result in disproportionate exposure to consumer fraud class-action litigation.

We welcome the opportunity to answer any questions you may have regarding the new health care reform rules described above or to assist you in complying with them.