



PACIFIC LEGAL FOUNDATION

June 29, 2017

Ms. 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

SUBMITTED VIA: Regulations.gov

Re: Docket No. FDA-2011-F-0172
Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar
Retail Food Establishments; Extension of Compliance Date; Request for Comments

Dear Deputy Commissioner Abrams:

Pacific Legal Foundation appreciates the opportunity to comment on the Food and Drug Administration's menu labeling rule. PLF is a nonprofit legal organization that litigates to advance the principles of limited government, individual rights, and the First Amendment. To that end, PLF represents individuals free of charge in courts around the Nation, including nine victories in the Supreme Court of the United States.

I. Introduction

The menu labeling rule requires restaurants with 20 or more locations to display calorie counts for each item on the menu. According to the FDA, restaurants must display calorie counts for meals from sit-down restaurants, food purchased at drive-through windows, and even food that consumers serve themselves from a salad bar.¹ Grocery stores, too, must display calorie counts for ready-to-eat foods.²

¹ Food and Drug Admin., Food Labeling; Nutritional Labeling of Standard Menu Items in Restaurants and Similar Food Establishments, 79 Fed. Reg. 71156-01, 71155, 71158 (Dec. 1, 2014).

² *Id.*

PLF submits this comment letter to highlight the First Amendment problems with the menu labeling rule. The First Amendment protects the right to free speech just as much as its corollary—the right not to speak. The menu labeling rule unconstitutionally compels speech by requiring restaurants and grocery stores to list calories on menus.

What's more, a law that requires restaurants to post caloric information does not make American consumers healthier. Instead, it hurts small businesses that can't afford to pay a lab to test every item on their menu and reprint menus every time they wish to offer something new. Rather than adopt this costly and unconstitutional rule, the FDA should continue promoting its educational material about healthy meal choices.

II. The Menu Labeling Rule Violates the First Amendment

Just as a person has a First Amendment right to speak, that person also has a First Amendment right not to speak.³ As the Supreme Court of the United States recognized four decades ago, the right to speak and the right not to speak are complementary components of individual freedom.⁴ Thus, courts generally apply the same scrutiny to laws that restrict speech and laws that compel speech.⁵

Under the commercial speech doctrine, a court applies intermediate scrutiny to speech that “does no more than propose a commercial transaction.”⁶ Courts applying intermediate scrutiny place the burden on the government to show that a speech mandate directly furthers a substantial governmental interest, and burdens no more speech than necessary to further that interest.⁷

The Supreme Court has countenanced only one exception to the rule that intermediate scrutiny is the proper standard by which to adjudge laws that compel commercial speech.⁸ Under the *Zauderer* exception, courts may apply a lenient form of review akin to rational basis review when a law compels “factual and uncontroversial” disclosures necessary to further the government’s interest in preventing deception. Some commentators suggest that this exception requires judges to “cup [their] hands over [their] eyes” to think of reasons to uphold the law.⁹ Fortunately, the *Zauderer*

³ See *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion).

⁴ See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (speaking and silence are “complementary components of the broader concept of ‘individual freedom of mind’”).

⁵ See *id.*

⁶ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

⁷ See *Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

⁸ See *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985).

⁹ *Arceneaux v. Treen*, 671 F.2d 128, 136 n.3 (5th Cir. 1982) (Goldberg, J., concurring).

exception does not apply here because the FDA does not assert that the menu labeling rule prevents deception. Instead, the FDA's asserted purpose for the Rule is helping "consumers [] make informed and healthful dietary choices."¹⁰

The menu labeling rule is thus subject to intermediate scrutiny—and it fails that standard. To satisfy intermediate scrutiny, the menu labeling rule must directly further the government's interest in promoting health. Yet numerous studies have pointed out that posting calories on menus has no appreciable effect on changing consumers' diets.¹¹

Beyond that, nutritional scientists do not look to calories alone in determining the nutritional value of food. Instead, they take a more holistic approach—considering minerals, vitamins, nutritional density, and so forth. According to a Harvard School of Public Health study of 120,000 people, the nutritional quality of foods was significantly more important to a person's health than the number of calories alone.¹² Perhaps for that reason, the United States Department of Agriculture's dietary guideline advises consumers to choose nutrient-dense foods instead of focusing on calories alone.¹³ And Weight Watchers adjusted its popular points system to reflect the differences in nutritional value between an apple and a 100-calorie pack of Oreos, which were previously both worth two points because they contained roughly the same number of calories.¹⁴

Because calorie counts do not provide the full picture with respect to nutrition, the menu labeling rule pressures restaurants and grocery stores to alter their speech. Restaurant owners and grocers may feel the need to put caloric information in context by pointing out healthy elements (vitamins, nutritional density, etc.) of a food. Therefore, the menu labeling rule invokes precisely the concern that the Supreme Court expressed in its compelled speech cases. In other words, the Rule will "force[] speakers to alter their speech to conform with an agenda they do not set."¹⁵ All told, the menu labeling rule fails intermediate scrutiny and violates the First Amendment.

¹⁰ Food and Drug Admin., Food Labeling; Nutritional Labeling of Standard Menu Items in Restaurants and Similar Food Establishments, 79 Fed. Reg. st 71155, 71177-78.

¹¹ See Aaron Carroll, *The Surprising Failure of Calorie Counts on Menus*, *The Incidental Economist* (Dec. 2, 2015, 6:35AM), <http://theincidentaleconomist.com/wordpress/the-surprising-failure-of-calorie-counts-on-menus/>; see also *infra* n.22.

¹² See Dariush Mozaffarian, Tao Hao, Eric B. Rimm, Walter C. Willett, and Frank B. Hu, *Changes in Diet and Lifestyle and Long-Term Weight Gain in Women and Men*, *New England Journal of Medicine*, June 23, 2011, at 364:2392-2404.

¹³ U.S. Dep't of Agric. 2015-2020 Dietary Guidelines for Americans (8th ed. Dec. 2015), https://health.gov/dietaryguidelines/2015/resources/2015-2020_Dietary_Guidelines.pdf.

¹⁴ See also Elissa Gootman, *Weight Watchers Upends Its Points System*, *N.Y. Times*, Dec. 3, 2010, http://www.nytimes.com/2010/12/04/nyregion/04watchers.html?_r=1&scp=2&sq=weight%20watchers&st=cse.

¹⁵ *Pac. Gas & Elec. Co.*, 475 U.S. at 9.

III. The Menu Labeling Rule Hurts Small Businesses and Their Consumers

The menu labeling rule produces dubious benefits at significant costs. According to one estimate, it will cost grocery stores a billion dollars to implement the Rule in the first year alone.¹⁶ Grocers must pay over 225 million dollars for labs to measure the caloric content of ready-to-eat foods, and another 150 million dollars to place that information on menu boards and signs.¹⁷ And it's not just grocers who will bear the burden of these enormous costs, as many grocers will pass the costs to consumers who shop at grocery stores and supermarkets.¹⁸

The menu labeling rule imposes staggering costs not just in the aggregate, but also on individuals who own small businesses around the Nation. Take, for example, entrepreneurs who own pizza franchises. Many of these entrepreneurs pay their franchisors for the ability to use the franchise's logo, but receive little in the way of financial support. These franchisees—small-business owners who pay for large-business logos—bear costs upwards of \$5,000 just to replace their menus,¹⁹ and several hundred dollars per plate for a lab to determine the calorie count of every item they offer to their patrons.²⁰

Against these staggering costs, the menu labeling rule would produce no discernable benefit to consumers. The *American Journal of Public Health* found no significant impact in the relationship between calorie labeling and what consumers actually order.²¹ Further studies support this finding and show no clear correlation between a person seeing calories displayed and ordering a lower calorie meal.²² The expensive price tag the FDA would force businesses and consumers to pay would result in little, if any, meaningful change in human health.

¹⁶ "Comments on Proposed FDA Menu Labeling Rule," Food Marketing Institute (July 5, 2011) 1, 17.

¹⁷ *Id.* at 17.

¹⁸ *Id.* at 7.

¹⁹ Alessandra Malito, *Why pizzerias don't want to post calories in their stores*, Market Watch (Apr. 21, 2017, 10:28 AM), <http://www.marketwatch.com/story/pizza-restaurants-dont-want-to-post-calories-on-in-store-menus-2017-04-17>.

²⁰ For example, QC Laboratories charges \$700 per plate. QC will charge \$150-200 to use an existing database of ingredients and calories but it is not clear from the FDA law that this type of measurement will not amount to a violation if there are inaccuracies in the estimation. Tracey Samuelson, *How restaurants calculate calorie counts*, Market Place (Nov. 25, 2014, 2:01 PM), <https://www.marketplace.org/2014/11/25/business/how-restaurants-calculate-calorie-counts>.

²¹ *Id.*

²² Katherine Harmon, *Does Calorie-Labeling at Restaurants Lead to Healthier Eating?*, Scientific American, Jan. 14, 2011 (Harmon interviews Eric Finkelstein, associate professor at Duke University's Global Health Institute, who was an author of the *American Journal of Preventative Medicine* year-long study of calorie count listings on menus in Seattle. He tells Harmon, "The fact that it was zero change was a little surprising. This information just doesn't change

The FDA has plenty of alternatives to promote informed decision-making. For instance, the FDA's Center for Food Safety and Applied Nutrition has many resources and materials geared at educating adults and children on nutritional information.²³ The Center provides tools for choosing healthy foods and multimedia materials for educators or anyone else interested in learning about healthy eating.²⁴ Additional resources direct visitors to "Choose My Plate," the USDA's campaign to promote healthy eating.²⁵ Consumers interested in health will provide restaurants with a natural incentive to compete for their business by providing healthier options and voluntarily touting nutritional information on their menus. Indeed, that is precisely what many restaurants, such as Subway, Chipotle, and even McDonalds have already done. Beyond violating the First Amendment, the menu labeling rule imposes significant costs and provides no discernable benefit.

IV. Conclusion

The FDA should discontinue its plan to enforce the menu labeling rule next year. The Rule imposes significant costs on businesses and consumers, and it violates the First Amendment.

Respectfully,



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their behavior. I think fast-food customers who are busy and interested in having a nice meal are just not that interested in the calorie posting. I think super healthy people just don't go to Taco Time.").

²³ U.S. Food and Drug Admin., *Nutrition Facts Label Programs and Materials* (last updated Apr. 3, 2017), <https://www.fda.gov/food/ingredientpackaginglabeling/labelingnutrition/ucm20026097.htm>.

²⁴ *Id.*

²⁵ U.S. Dep't of Agric., *Choose My Plate*, <https://www.choosemyplate.gov/>.