

Regulatory Alert: Final Rule on Vending Machine Labeling

January 15, 2015

On December 1, 2014, the U.S. Food and Drug Administration (FDA) published a final regulation in the Federal Register requiring businesses who own or operate 20 or more vending machines to provide calorie declarations for certain foods sold from the vending machines. Calorie declarations must be clear and conspicuous and be on the machine itself or on a separate sign in close proximity to the food sold. Items with multiple options (e.g. soda where the consumer selects from multiple syrups) are covered. Certain exemptions apply. Please see questions and answers on the rule below. For additional information please contact Erik Lieberman at erl1@liebermanpllc.com or 202.830.0300.

Why was this rule issued?

The Affordable Care Act (aka Obamacare) required FDA to publish the vending labeling rule.

Who is required to comply with the rule?

Persons engaged in the business of owning or operating 20 or more vending machines.

When is compliance required?

December 1, 2016.

What is considered a vending machine?

Vending machines that sell soft drinks, packaged snacks, hot-and-cold cup beverages, refrigerated prepared food (such as those sold from turnstile vending machines), and handfuls of nuts or candies (such as those sold from bulk vending machines) are generally covered. Game machines are not covered even if they sometimes dispense food (e.g. candy) as a prize.

What articles of food are exempt?

- Food that is sold in a manner which allows the consumer to examine before purchase the calories, serving size and servings per container listed in the Nutrition Facts label on the food without any obstruction
- Food that is sold in manner where the consumer is provided with the calories, serving size, and servings per container listed in a reproduction of the Nutrition Facts label before purchasing the item

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- Food that is sold in a manner where the consumer can view the total number of calories for the article of food as sold at the point of purchase. The calories must appear on the label itself (e.g. front-of-package labeling). Minimum type size requirements apply.

How must calorie information be declared?

- To the nearest 5-calorie increment up to and including 50 calories and 10-calorie increment above 50 calories.
- The terms “Calories” or “Cal” must appear adjacent to the caloric content value for each food in the vending machine.
- The calorie declaration for a food must include the total calories present in the entire item, regardless of whether the package contains a single serving or multiple servings.
 - Calories per serving may be disclosed voluntarily

What about vending machines where consumers can select options which alter the nutrient content of the final product (e.g. vended coffee with options for cream and sugar, soda with various flavored syrups added)?

- Calories must be declared per option or as totals for the final vended products.
- Calorie ranges are not permitted.

What are the formatting requirements for calorie declarations?

- Calorie declarations must be clear and conspicuous
- Calorie declarations may be placed on a sign in close proximity to the article of food or selection button.
 - The sign may be in, on, or adjacent to the vending machine, but not necessarily attached to it so long as the calorie declaration is visible at the same time as the food, its name, price, selection button or selection is visible.
 - The sign must give calorie declarations for those articles of food that are sold from that particular vending machine.
 - The sign cannot list items that not sold from the vending machine, although it can include regular items that are temporarily sold-out until restocking, or temporarily replaced by other items.
- When the calorie declaration is in or on the vending machine, the calorie declaration must be in a type size no smaller than the name of the food on the machine (not the label), selection number, or price of the food as displayed, whichever is smallest, with the same prominence (specific requirements apply).
- When the calorie declaration is on a sign adjacent to the vending machine, the calorie declaration must be in a type size large enough to render it likely to be read and understood by the consumer under customary conditions of purchase and use, and in a type that is all black or one color on a white or other neutral background that contrasts with the type color.

- Where the vending machine only displays a picture or other representation or name of the food item, the calorie declaration must be in close proximity to the picture or other representation or name, or in close proximity to the selection button.
- For electronic vending machines, (e.g. machines with digital or electronic or LCD displays), the calorie declaration must be displayed before the prospective purchaser makes his or her purchase.
- For vending machines with few choices (e.g. popcorn), the calorie declaration may appear on the face of the machine so long as the declaration is prominent, not crowded by other labeling on the machine, and the type size is no smaller than the name of the food on the machine, selection number, or price as displayed on the machine, whichever is smallest.

Is voluntary compliance available for vending machine owners or operators with fewer than 20 machines?

Yes. Vending machine owners/operators may voluntarily comply with the vending labeling rule to avoid complying with differing state and local vending nutrition labeling requirements.

If you have additional questions please contact Erik Lieberman at erl1@liebermanpllc.com or 202.830.0300.