

## **Regulatory Alert: FDA Postpones Menu Labeling Compliance Date**

### ***Action Taken to Stave Off State Enforcement Efforts***

#### **December 5, 2016**

On Friday, December 2, 2016, the U.S. Food and Drug Administration (FDA) announced that it will shortly be releasing a final rule to delay the compliance date for the Menu Labeling Regulation<sup>1</sup> until May 5, 2017. This compliance date is now aligned with FDA's enforcement date. In 2015 Congress passed the Consolidated Appropriations Act (Omnibus) enacted into law which denied FDA the ability to use funds to enforce the Menu Labeling Regulation until May 5, 2017, thus postponing enforcement by FDA until that date. The legislation did not however change the compliance date of December 1, 2016. Please note that on November 29, FDA issued a statement that the compliance date of the Menu Labeling Regulation was December 1, 2016, and the enforcement date was May 5, 2017. This statement was superseded by the December 2 statement. The original compliance date for menu labeling was December 1, 2015, but FDA previously issued a rule extending that date to December 1, 2016.

#### **Why did FDA take this action?**

FDA has taken this action because certain states had authority to enforce the Menu Labeling Regulation on December 1, 2016. California indicated it had plans to do so.

#### **What authority do states have to enforce the Menu Labeling Regulation?**

The Federal Food, Drug and Cosmetic Act allows states to adopt federal menu labeling requirements as state law.<sup>2</sup> Certain states, including California, have adopted federal menu labeling requirements (as well as other labeling requirements), as state law.

#### **Can my company be sued under state consumer protection laws for violating menu labeling requirements?**

Yes. Courts have ruled that businesses, including food retailers, can be sued by private litigants for misbranding food products under a state law that was identical to federal law.<sup>3</sup>

Please contact Erik Lieberman at [erl@liebermanpllc.com](mailto:erl@liebermanpllc.com) or 202.830.0300 if you have questions or would like additional information.

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<sup>1</sup> 21 CFR §101.11.

<sup>2</sup> 21 USC § 343-1(a)(4).

<sup>3</sup> *Farm Raised Salmon Cases*, 42 Cal. 4<sup>th</sup> 1077, 72 Cal. Rptr. 3d 112, 175 P.3d 1170 (2008).

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