THE VOICE OF FOOD RETAIL

Feeding Families Enriching Lives

June 12, 2012

The Honorable Barack H. Obama
President of the United States
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Re: Executive Order 13610 and FDA's Regulation on Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments

Dear Mr. President:

The Food Marketing Institute (FMI)[1] commends you for issuing Executive Order 13610 which requires agencies to "give consideration to the cumulative effects of their own regulations, including cumulative burdens . . . and . . . give priority to reforms that would make significant progress in reducing those burdens . . ." While E.O. 13610 imposes this requirement in the context of retrospective review of rules, it also cites the obligation of agencies to consider cumulative burdens pursuant to E.O. 12866 and E.O. 13563 when issuing new regulations.

On April 6, 2011, the U.S. Food and Drug Administration (FDA) published a proposed rule to implement § 4205 of the Affordable Care Act,[2] which requires restaurants and "similar retail food establishments" that are part of a chain with 20 or more locations doing business under the same name to provide calorie and other nutrition information for standard menu items (Proposed Rule).

While FDA acknowledged that § 4205 did not require them to regulate supermarkets, the agency proceeded to do so anyway—in virtually the broadest manner conceivable. As a consequence, grocers bear a far more costly burden than restaurants. FMI has estimated that this burden will exceed $1 billion in the first year of compliance alone, with ongoing burdens costing the industry hundreds of millions of dollars annually.

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[1] The Food Marketing Institute conducts programs in public affairs, food safety, research, education and industry relations on behalf of its nearly 1,250 food retail and wholesale member companies in the United States and around the world. FMI's U.S. members operate more than 25,000 retail food stores and almost 22,000 pharmacies with a combined annual sales volume of nearly $650 billion. FMI's retail membership is composed of large multi-store chains, regional firms and independent operators. Its international membership includes 126 companies from more than 65 countries. FMI's nearly 330 associate members include the supplier partners of its retail and wholesale members.

2 Pub. L. No. 111-48.

In crafting the Proposed Rule, FDA failed to consider cumulative impacts of its regulations on food retailers. Supermarkets face a host of labeling and food safety rules that restaurants do not and compliance departments of retailers are stretched thin. Exhibit A outlines many of these burdens.
More than 95 percent of food items at the typical supermarket are already required to bear nutrition labeling under federal law. The burden of capturing the remaining 5 percent or less of food items within the store far outweighs any purported benefit of menu labeling. Indeed, FDA has failed to quantify any benefit that would accrue from this regulation.

As profit margins in the industry average less than a penny on the dollar, a costly new regulatory burden such as menu labeling would mean the loss of jobs and ultimately higher costs for consumers. We urge you to ensure that FDA considers the cumulative burdens of its regulations in light of its proposal to extend menu labeling requirements to supermarkets. If the agency does fully contemplate these cumulative burdens, we believe it can come to no other conclusion than to limit the scope of the rule to restaurants and similar establishments—a scope that is more consistent with the text of § 4205. Fortunately, FDA is considering this alternative.

FDA included an option in the Proposed Rule—referenced as "Option 2"—that would provide more than $1 billion in relief to the supermarket industry and consumers while allowing the agency to achieve regulatory objectives. We believe E.O. 12866 and 13563 demand that FDA adopt Option 2 and respectfully request that you ensure that the agency does so.

We appreciate your consideration of this matter.

Sincerely,

Erik R. Lieberman
Regulatory Counsel

CC: Hon. Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget

Attachment A

Regulatory Burdens Faced by Supermarkets and Restaurants		
Regulation	***Compliance Required by Supermarkets***	***Compliance Required by Restaurants***
Country of Origin Labeling (7 C.F.R. pt. 60; 21 U.S.C §§ 301-399)	Yes	No
Identity Statement (21 C.F.R. § 101.3; 21 U.S.C. § 343(i)(1))	Yes	No
Net Quantity of Contents (21 C.F.R. § 101.105; 21 U.S.C. § 343(e)(2))	Yes	No
Ingredient Labeling (21 C.F.R. §§ 101.4; 21 U.S.C. § 343(i)(1))	Yes	No
Use By Dating	Yes	No
Nutrition Labeling (FDA) (21 C.F.R. § 101.9; 21 U.S.C. § 343(q))	Yes	Pending
Nutrition Labeling of Raw Meat and Poultry (9 C.F.R. §§ 317.300-345 and 381.400-445; 21 U.S.C. § 343(q))	Yes	No
Allergen Labeling (Pub. L. No. 108-282)	Yes	No
Presence of Artificial Colors, Chemical Preservatives and Artificial Flavors (21 C.F.R. 101.22; 21 U.S.C. § 343(i)(1))	Yes	No
Signature Line (21 C.F.R. § 101.5; 21 U.S.C. § 343(e)(1))	Varies by state	No
Safe Handling Instructions (21 C.F.R. § 101.17)	Yes	No
Bioterrorism Act Recordkeeping (21 C.F.R. § 1.327; Pub.L. No.107-188)	Yes	No
Recall Notification (Pub. L. 111–353)	Yes	No