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# HITTING CALORIES OUT OF THE BALLPARK: AN EXAMINATION OF THE FDA'S NEW MENU LABELING LAWS AND THEIR IMPACT ON SPORTS SPECTATORSHIP

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## I. INTRODUCTION

Valued at \$414 billion, the sport industry is among the largest and fastest growing industries in the United States<sup>1</sup>, and food consumption at sporting events is a vital part of the spectator sport experience. Millions of people across the United States flock to stadiums, arenas, and bars to watch sporting events. However, the consumption decision to attend a sporting event extends well beyond the purchase of the ticket or the taking of a seat at the bar. Unlike comparable consumption decisions on most tangible products, the decision to attend a sporting event includes the intention to stay in the venue or bar for an extended amount of time.<sup>2</sup> In stadiums, consumers are presented with a host of food and beverage options, and are exposed to a multitude of food-related sponsorships and advertisements. Not only does attending a sporting event present consumers with a variety of food options, research suggests that food consumption plays a significant role

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<sup>1</sup> David R. Sweeney & Donna G. Quimby, *Exploring the Physical Health Behavior Differences between High and Low Identified Sports Fans*, SPORT J. 15 (2012), <http://www.thesportjournal.org/article/exploring-physical-health-behavior-differences-between-high-and-low-identified-sports-fans>.

<sup>2</sup> Kirk L. Wakefield & Hugh J. Sloan, *The Effects of Team Loyalty and Selected Stadium Factors on Spectator Attendance*, 9 J. SPORT MGMT. 153, 153-72 (1995).

in determining the level of satisfaction spectators obtain from the live sport experience.<sup>3</sup> Therefore, there exists a mutually beneficial relationship between two American pastimes—eating and watching sports.

From a public health perspective, the consumption and marketing of these relatively unhealthy foods and beverages during sport spectatorship poses great health concerns. According to the U.S. Centers for Disease Control and Prevention (“CDC”), 68% of the U.S. adult population is either overweight or obese, with the prevalence of obesity having steadily increased over the past three decades.<sup>4</sup> This increase put individuals at an elevated risk for diabetes, hypertension, stroke, and other cardiovascular diseases.<sup>5</sup> Obesity also contributes to the ballooning cost of medical expenditures in the U.S. In 2008, the medical costs associated with obesity totaled about \$147 billion.<sup>6</sup> In search of a solution, Congress has targeted food offered by restaurants as a significant contributor to this problem.<sup>7</sup> About one-third of calories consumed by Americans are foods prepared outside of the home.<sup>8</sup> Additionally, 50% of food expenditures are on restaurant and restaurant-type foods, which are generally high in

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<sup>3</sup> *Id.*

<sup>4</sup> Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. 19192, 19221 (Apr. 6, 2011) (to be codified at 21 C.F.R. pts. 11 and 101) (*citing* Cynthia L. Ogden & Margaret D. Carroll, *Prevalence of Overweight, Obesity, and Extreme Obesity Among Adults: United States, Trends 1976–1980 Through 2007–2008*, National Center for Health Statistics (June 2010), available at [http://www.cdc.gov/NCHS/data/hestat/obesity\\_adult\\_07\\_08/obesity\\_adult\\_07\\_08.pdf](http://www.cdc.gov/NCHS/data/hestat/obesity_adult_07_08/obesity_adult_07_08.pdf)).

<sup>5</sup> *Id.* (*citing* P.W. Sullivan, V. Ghushayan, and R.H. Ben-Joseph, *The Effect of Obesity and Cardiometabolic Risk Factor on Expenditures and Productivity in the US*. 16 OBESITY 2155, 2155–2162 (2008)).

<sup>6</sup> Eric A. Finkelstein, et al., *Annual Medical Spending Attributable to Obesity: Payer-and Service-Specific Estimates*, 28 HEALTH AFF. w822, w822 (2009).

<sup>7</sup> Food Labeling Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. at 19221. (*citing* USDA, ERS *Table 1: Food and alcoholic beverages: Total expenditures*, <http://www.ers.usda.gov/Briefing/CPIFoodAndExpenditures/Data/> (last visited Jan. 6, 2011)).

<sup>8</sup> *Id.* at 19192 (*citing* Biing-Hwan Lin, Joanne Guthrie & Elizabeth Frazao, *Nutrient Contribution of Food Away From Home*, 750 USDA AGRICULTURE INFORMATION BULLETIN, 213-42 (May 1999)).

calories and fat and served in relatively large portion sizes.<sup>9</sup>

Through the enactment of Section 4205 of the Patient Protection and Affordable Care Act of 2010 (the “Affordable Care Act”), Congress now seeks to require restaurants and similar retail food establishments (for example, sport bars and grills) with 20 or more locations and substantially the same menu items, to provide the calorie content of each menu item on the restaurants’ menu board, “drive-thru” menu board, and individual menu pamphlet. These regulations are generally known as the “menu labeling laws.”

Many of the key public health concerns in the United States that led to the enactment of menu labeling laws are related to an American diet that includes excessive amounts of calories, saturated fats, sodium, and sugar. The increased popularity of eating outside of the home and the potential for expansion in sport spectatorship will have a substantial effect on how the proposed menu labeling laws will affect the way food is consumed in sport establishments in the future.

## II. THE ROLE OF FOOD CONSUMPTION IN THE CONTEXT OF SPORT SPECTATORSHIP

Sport venues have become a popular place for consumers to indulge in snack foods and for companies to strategically position these foods for consumption by a captive audience. The symbiotic relationship between food and sport spectatorship goes back as far as spectator sports itself and is as American as the ball park anthem written in 1908: “Take me out to the ball game. . . buy me some peanuts and Cracker Jacks.”

### *A. Historical View of Food Consumption in Spectator Sport*

Having thousands of fans in an arena for several hours has always been profitable for food manufacturers, restaurants, and sport franchises selling food items, many of which are high in calories. As stated in a Sports Illustrated article published in 1966:

[In 1908] little boys and grown men loved the juicy

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<sup>9</sup> *Id.* at 19221 (citing Megan A. McCrory, Paul J. Fuss, Edward Saltzman & Susan B. Roberts, *Dietary Determinants of Energy Intake and Weight Regulation in Healthy Adults*, 130 J. NUTRITION 2765–95 (2000)).

splat when they bit into mustard-smearred hot dogs. The crunch of peanut shells underfoot was as satisfying as hiking over crisp autumn leaves. Spectators washed their insides with so much sugary soda pop that they left for home with the same body chemistry as a jelly doughnut.<sup>10</sup>

Many times fans have limited choices for dining and subsequently few, if any, healthy alternatives. Most fans instead find themselves indulging in traditional fast food options such as beer, soda, peanuts, and hot dogs. For instance, when Dodgers Stadium—a sporting venue that seats 56,000—was built five decades ago, every measure was taken to create a state of the art baseball park, except for the inclusion of an adequate amount of drinking fountains. In an effort to profit from liquid consumption, and despite complaints from the community, only three water fountains were installed in the entire stadium—one in each dugout and one in the owner's office.<sup>11</sup>

The quality of the food served at many stadiums and arenas can be flavorful, yet questionable from a nutritional standpoint. The calorie-, fat-, and sodium-rich processed foods range from ethnic favorites like burritos and pizza to fast-food fare like hot dogs and hamburgers, to alcoholic beverages like cocktails and beer—all sold for the purposes of boosting revenue and enhancing customer satisfaction.

An important benefit that sport provides to companies that sell foods in stadiums and arenas is that these foods are vicariously associated with healthy active images (that is, sport participation). Research suggests that this is particularly important when promoting products that may pose health risks.<sup>12</sup> Such tactics are reminiscent of tobacco commercials that employed caricatures and cartoons to sell cigarettes.<sup>13</sup>

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<sup>10</sup> Joe Jares, *Their Business is Peanuts*, SPORTS ILLUSTRATED, Jan. 17, 1966, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1078098/2/index.htm>.

<sup>11</sup> *Id.*

<sup>12</sup> Anthony Maher, Nick Wilson, Louise Signal, & George Thomson, *Patterns of Sports Sponsorship by Gambling, Alcohol and Food Companies: An Internet Survey*, 6 BMC PUBLIC HEALTH 95 (2006), <http://www.biomedcentral.com/1471-2458/6/95>.

<sup>13</sup> Billie Corti, C. D'Arcy J. Holman, Robjert J. Donovan, Shirley K. Frizzell, & Andy M. Carroll, *Using Sponsorship to Create Healthy Environments for Sport, Racing and Arts Venues in Western Australia*,

*B. Recent Trends in Food Consumption in Spectator Sport*

In today's spectator sport landscape, the relationship between fans and junk food has taken new forms. Due to sport fans' adulation for their favorite athletes, corporate fast-food giants are utilizing some of the world's greatest athletes, like U.S. Olympic gold medalist Shawn Johnson, to pitch fast food.<sup>14</sup> In the same vein, food manufacturers have opted to purchase stadium naming rights. In 2010, the Yum! Brands paid \$13.5 million to name the University of Louisville's basketball arena the KFC Yum Center (also known as "The Bucket").<sup>15</sup> As part of the agreement, the KFC Yum Center agreed to sell products from four of the Yum! Brands' restaurant chains (KFC, Pizza Hut, Taco Bell, and Long John Silvers) in several concession stands within the arena.<sup>16</sup> Similarly, Papa John's purchased the naming rights to Cardinal Stadium for \$5 million and features its signature line of pizzas throughout the stadium.<sup>17</sup>

Further, in recent years sport organizations and celebrities have begun capitalizing on the relationship between food and sport spectatorship by delving into the restaurant industry through selling their naming rights to food manufacturers (e.g., Indianapolis Colts Grille, Fox Sports Grill, Ditka's, and Michael Jordan Steakhouse). Unhealthy menu items such as fries, wings, burgers, and nachos are a staple at these establishments where sports fans frequent to watch sporting events.

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10 HEALTH PROMOTION INT'L 185, 185-97 (1995).

<sup>14</sup> Steve Holt, *Junk Food Olympiads: Athletes Fuel Games' Fast-Food Assault*, TAKE PART (Aug. 2, 2012), <http://www.takepart.com/article/2012/08/02/junk-food-olympiads-athletes-fuel-games-fast-food-assault>.

<sup>15</sup> Marcus Green, *Yum! To Pay \$13.5 million To Name Downtown Arena KFC Yum! Center*, THE COURIER-JOURNAL (Apr. 19, 2010), <http://www.courier-journal.com/article/20100419/sports02/4190326/Yum-pay-13-5-million-name-downtown-arena-KFC-Yum-Center>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

### III. THE PARAMETERS OF THE FDA'S PROPOSED MENU LABELING REGULATIONS

#### *A. Legislative History of the Menu Labeling Laws*

The Nutrition Labeling and Education Act of 1990 ("NLEA") specified that a food is misbranded if its label or labeling does not bear nutrition information.<sup>18</sup> However, the NLEA included an exemption for nutrition labeling for food that is served in restaurants or other establishments in which food is served for immediate consumption or sold for sale or use in such establishments.<sup>19</sup> The exemption was contingent upon there being no nutrient content claims or health claims made on the label or labeling or in the advertising for the food.<sup>20</sup> Consequently, nutrition information is generally not available for foods sold in restaurants and similar retail food establishments.

Given the health and financial costs of a largely overweight and obese population, Congress began discussing removing this exemption for restaurants and similar establishments. Research shows that consumers are generally either unaware of, or inaccurately estimate, the number of calories contained in restaurant foods.<sup>21</sup> Therefore, Congress sought to enact legislation that would make the general public more aware of the calories that they consume in food from restaurants so as to incentivize consumers to select foods with fewer calories and to encourage restaurants to offer a larger selection of lower calorie menu items.<sup>22</sup> The rationale being that with increased awareness will come a decrease in obesity and obesity-associated costs. Prior to 2010, menu-labeling

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<sup>18</sup> Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. 19192, 19192-93 (Apr. 6, 2011) (to be codified at 21 C.F.R. pts. 11 and 101)

<sup>19</sup> *Id.* at 19193.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 19192 (citing Scot Burton, Elizabeth H. Creyer, Jeremy Kees, & Kyle Huggins, *Attacking the Obesity Epidemic: The Potential Health Benefits of Providing Nutrition Information in Restaurants*, 96(9) AM. J. PUB. HEALTH 1669, 1669-75 (Sept. 2006)).

<sup>21</sup> *Id.* at 19192 (citing Scot Burton, Elizabeth H. Creyer, Jeremy Kees, & Kyle Huggins, *Attacking the Obesity Epidemic: The Potential Health Benefits of Providing Nutrition Information in Restaurants*, 96(9) AM. J. PUB. HEALTH 1669, 1669-75 (Sept. 2006)).

<sup>22</sup> *Id.* at 19220-21.

requirements were only present on a state-by-state basis, resulting in a patchwork of inconsistency throughout the country.

On March 23, 2010, the Affordable Care Act was signed into law.<sup>23</sup> Section 4205 of the Affordable Care Act amends section 403(q) of the Food, Drug & Cosmetic Act (“FD&C”) and section 403A of the FD&C Act.<sup>24</sup> These sections respectively govern nutrition labeling requirements and federal preemption of state and local food labeling requirements.<sup>25</sup> Under the authority vested by Section 4205 of the Affordable Care Act, on April 6, 2011, the FDA issued proposed menu labeling regulations requiring that restaurants and similar retail food establishments that are part of a chain with 20 or more locations doing business under the same name and offering for sale substantially the same menu items must provide calorie information for standard menu items.<sup>26</sup> Establishments must also provide a succinct statement regarding daily caloric intake posted prominently on the menu or menu board.<sup>27</sup> Further, upon consumer request, establishments are required to provide additional written nutrition information for standard menu items.<sup>28</sup> If the new menu labeling requirements are not met, the food is deemed misbranded.<sup>29</sup> On January 17, 2013, the United States Office of Management and Budget announced that April 2013 will be the final action period for implementation of the menu labeling laws.<sup>30</sup> According to the FDA’s proposed regulations, once issued, the final menu labeling laws will become effective six months from the date of their

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<sup>23</sup> The United States Supreme Court affirmed The Affordable Care Act on June 28, 2012.

<sup>24</sup> Food Labeling Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. at 19193.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., *Announced Date for Nutritional Menu Labeling Rule Sets Goal for Restaurants*, PR NEWswire (Jan. 17, 2013), <http://www.prnewswire.com/news-releases/announced-date-for-menu-nutritional-labeling-rule-sets-goal-for-restaurants-187320691.html>; *Announced Date for Menu Labeling Rules*, ABC RESEARCH LABORATORIES BLOG (Jan. 17, 2013), <http://info.abcr.com/Blog/bid/259925/Announced-Date-for-Menu-Nutritional-Labeling-Rule>; *FDA Menu Labeling Date Announced*, LIFESTYLE FACTORS BLOG (Jan. 17, 2013), <http://www.lifestylefactors.net/article/fda-menu-labeling-law-date-announced>.

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publication.<sup>31</sup>

*B. Establishments Covered Under the Labeling Requirements of the Menu Labeling Laws*

Under the proposed regulations, the FDA limits the menu labeling laws to only establishments that sell restaurant or restaurant-type food. Additionally, the sale of this food must be the establishment's "primary business activity."<sup>32</sup> The FDA considers the sale of food as an establishment's primary business activity if either the establishment presents or has presented itself publicly as a restaurant *or* greater than 50% of a retail establishment's gross floor area is used for the preparation, purchase, service, consumption, or storage of food.<sup>33</sup> Further, the FDA requires that only chains or similar retail establishments with 20 or more locations be subject to the menu labeling laws.<sup>34</sup> The FDA has concluded that the type of ownership of the locations, whether a corporate owner or an individual franchisee owner, does not matter when determining whether a chain has 20 or more locations.<sup>35</sup>

Under the proposed menu labeling laws, sports arenas and stadiums would not be subject to the disclosure requirements. Generally, sports stadiums and arenas would not be considered covered establishments because the sale of food is not the primary business activity at a sports stadium nor is greater than 50% of the establishments' gross floor area used for the preparation, purchase, service, consumption, or storage of food.<sup>36</sup> Therefore, sports stadiums are not considered a "restaurant or similar retail food establishment" as defined by the proposed menu labeling laws and most likely will be exempt under current form.

It is unclear, however, from the proposed menu labeling

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<sup>31</sup> Food Labeling Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. at 19219.

<sup>32</sup> *See id.* at 19197.

<sup>33</sup> *Id.*; *see also id.* at 19197-98, Table 1 – Are the Following Establishments "Restaurants or Similar Retail Food Establishments" Under the Proposed Rule?.

<sup>34</sup> *Id.* at 19201.

<sup>35</sup> *Id.* at 19204-05; *see also id.* at 19201, Table 4 – Statutory Criteria for Chain Retail Food Establishments.

<sup>36</sup> *See id.* at 19197-98, Table 1 – Are the Following Establishments "Restaurants or Similar Retail Food Establishments" Under the Proposed Rule?.

laws whether concession stands inside stadiums that are part of a chain with 20 or more locations (i.e., a Papa Johns concession counter located within a stadium) are subject to the disclosure requirements. If an entity is located inside a larger establishment, then the entity could be considered a separate establishment or a part of the larger establishment where it is located.<sup>37</sup> According to the above criteria, certain concession stands located inside sports stadiums would be considered a separate establishment from the larger stadium and be subject to the disclosure requirements. However, a generic stadium grill concession stand could be considered part of the larger stadium and, therefore, not subject to the menu labeling laws.

A sports bar, alternatively, would only be covered by the proposed menu labeling laws if it was part of a chain with 20 or more locations (or if it voluntarily registered with the FDA to be covered) and either presents itself as a restaurant under the proposed rule, or has 50% or more of its gross floor area used for the preparation, purchase, service, consumption, or storage of food. As discussed below, because the nutritional information of alcoholic beverages are not required to be disclosed by the menu labeling laws, it is not clear from the proposed regulations whether the sale of alcohol would be counted towards the 50% of the gross floor area calculation in order to be considered a covered establishment. Alcohol may be included in the gross floor area calculation because the definition of “food” in section 201(f) of the FD&C Act explicitly includes alcohol.<sup>38</sup> Local and regional sports bars which are not a part of a chain with 20 or more locations, however, would be exempt from the menu labeling laws.

### *C. Information That Must be Declared by Covered Establishments*

Covered establishments must disclose on menus and menu boards, in a clear and conspicuous manner, the number of calories contained in standard menu items as such items are usually prepared and offered for sale.<sup>39</sup> The calorie information must be adjacent to the name of the standard menu item so as to

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<sup>37</sup> *Id.* at 19200.

<sup>38</sup> *Id.* at 19202.

<sup>39</sup> *Id.* at 19206.

be clearly associated with the standard menu item.<sup>40</sup> The calorie information must be included on all menus and menu boards of covered establishments.<sup>41</sup> The FDA defines a “menu” or “menu board” as any writing of the covered establishment that is the primary writing that a consumer uses to make an order or selection, and this is interpreted from the vantage point of the consumer.<sup>42</sup> Take-out and delivery menus, as well as online menus, that include all or a significant portion of items offered for sale and from which consumers can make their order selections are also menus under the proposed rule.<sup>43</sup> While there is no set font size that the calorie information must be listed in, it must be no smaller than the font size of either the name or price of the standard menu item, whichever is smaller.<sup>44</sup>

Additionally, covered establishments must provide in a written form, and upon consumer request, nutritional information for each menu item, including the following: 1) the total number of calories derived from any source; 2) the total number of calories derived from the total fat; and 3) the amount of total fat, saturated fat, cholesterol, sodium, total carbohydrates, sugars, dietary fiber, trans fat, and total protein.<sup>45</sup> The nutritional information must be available on the premises of the establishment and the establishment must post the following statement, “Additional nutrition information available on request” on their menus and menu boards.<sup>46</sup>

Further, to provide consumers with a baseline to calculate their daily caloric intake, covered establishments must post the following succinct statement on their menus or menu boards: “A 2,000 calorie daily diet is used as the basis for general nutrition advice; however, individual calorie needs may vary.”<sup>47</sup> The statement must appear in a font size no smaller than the smallest font size for any caloric declaration appearing on the same menu or menu board.<sup>48</sup> For menus, the statement must appear on the bottom of each page of the menu and be directly above the

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 19201-02.

<sup>43</sup> *Id.* at 19202.

<sup>44</sup> *Id.* at 19206.

<sup>45</sup> *Id.* at 19211.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 19210.

<sup>48</sup> *Id.*

statement of availability of nutritional information if it is on the page.<sup>49</sup> On a menu board, the statement must appear on the bottom of the menu board, directly above the statement of availability.<sup>50</sup>

*D. Calories in Self-Service and Variable Menu Items Must Be Disclosed in Ranges – Including Beverages*

Written nutritional information for variable menu items must be declared for each variety, flavor, and each food component of the combination meal.<sup>51</sup> The FDA defines “variable menu item” as a “standard menu item that comes in different flavors, varieties, or combinations and is listed as a single menu item,” such as a milkshake that can be in chocolate, strawberry or vanilla flavors.<sup>52</sup> If the calories and other nutrients are the same for different flavors, varieties, and each substitutable component of the combination meal, then they are not required to be listed separately.<sup>53</sup> All items with the same nutrient levels can be listed together with the nutrient levels listed only once.<sup>54</sup> Calories must be declared as a range from lowest to highest for standard menu items that come in different flavors, varieties, or combinations but are listed as a single menu item.<sup>55</sup>

For self-service foods and foods on display, covered establishments must provide the caloric information on a sign adjacent to each food offering.<sup>56</sup> “Self-service food” is “restaurant or restaurant-type food that is offered for sale at a salad bar, buffet line, cafeteria line or similar self-service facility.”<sup>57</sup> This includes self-service beverages.<sup>58</sup> “Food on display” is “restaurant or restaurant-type food that is visible to the customer before the customer makes a selection, so long as there is not an ordinary expectation of further preparation by the customer before consumption.”<sup>59</sup> Food on display includes food behind a glass

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 19204, 19207-09, 19214.

<sup>52</sup> *Id.* at 19204.

<sup>53</sup> *Id.* at 19214.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 19207.

<sup>56</sup> *Id.* at 19215.

<sup>57</sup> *Id.* at 19204.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

counter for the purposes of showing the food before making a meal selection, but does not include meats and cheeses sold at delicatessens in grocery stores, because there is an ordinary expectation that the consumer will further prepare the food before it is consumed.<sup>60</sup> If there is already a sign displaying the item's name and/or price, then the caloric information may appear on that sign.<sup>61</sup> If there is not already such a sign, then one declaring the caloric information must be placed adjacent to the food item.<sup>62</sup>

If a menu or menu board lists all of the flavors of beverages individually, then calorie information must be provided by each individual listing of the beverage flavor.<sup>63</sup> When a general term is used such as soda, then a range of calories should be listed like a variable menu item.<sup>64</sup> The self-service beverage dispenser must have calorie declarations for each flavor or variety offered, so that a consumer can identify the calorie count with the corresponding variety or flavor.<sup>65</sup> It is important to note that alcoholic beverages are exempt from these requirements.<sup>66</sup>

*E. A Food's Nutrient Content Must be Determined by the Same Standard Used for Prepackaged Food*

Originally, in Section 4205 of the Affordable Care Act, Congress provided a reasonable basis standard for restaurants to determine the nutrient content of food offered. Under Section 4205, a covered establishment must, upon request, provide information on the reasonable basis used to determine the nutrient content for its standard menu items, self-serve foods, and food on display.<sup>67</sup> Previously the FDA accounted for this variation by including reasonable basis statutory language. However, the FDA's proposed menu labeling laws have tentatively disregarded the statutory reasonable basis language previously used for restaurant standards and substituted it with

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 19215.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 19216.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 19203-05.

<sup>67</sup> *Id.* at 19218.

the prepackaged processed food standard used for foods produced in processing facilities.<sup>68</sup>

According to the proposed menu labeling laws, the nutrient content of the food items should be determined by nutrient databases, cookbooks, laboratory analyses, and other reasonable means, including the use of labels on packaged foods that comply with the nutrition labeling requirements of section 403(q)(1) of the FD&C Act and § 101.9.<sup>69</sup> The calories declared on menus and menu boards must be to the nearest five-calorie increment up to and including fifty calories and to the nearest ten-calorie increment above fifty calories.<sup>70</sup> However, as opposed to packaged foods, there is no exact serving size in hand-prepared restaurant food. This is important because the nutritional contents of food are typically measured per serving size. Given that this exact serving size does not exist in hand-prepared restaurant food, it will be difficult to measure the nutritional content in this manner.

#### *F. Foods Covered Under the Menu Labeling Laws*

The FDA defines “restaurant food” as “food that is served in restaurants or other establishments in which food is served for immediate human consumption, i.e. to be consumed either on the premises where the food is purchased or while walking away, or that is sold for sale or use in such establishment.”<sup>71</sup> Alternatively, “restaurant-type food” is defined as food described in the definition of “restaurant food” that is “ready for human consumption, offered for sale to consumers but not for immediate consumption, processed and prepared primarily in a retail establishment, and not offered for sale outside of that establishment.”<sup>72</sup>

Covered establishments are required to provide calorie

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<sup>68</sup> Letter from Dawn Sweeney, Pres. & CEO, Natl. Restaurant Assn. to Margaret A. Hamburg, M.D., Commr., U.S. Food and Drug Administration, 3 (July 5, 2011), <http://www.restaurant.org/advocacy/issues/issue/?Issue=menulabel>.

<sup>69</sup> Food Labeling Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. at 19217-18.

<sup>70</sup> *Id.* at 19207.

<sup>71</sup> *Id.* at 19203.

<sup>72</sup> *Id.*

and other nutrition information for food that is a standard menu item, including: combination meals, variable menu items, self-service food, and food on display.<sup>73</sup> The FDA defines a “standard menu item” as “restaurant or restaurant-type food that is routinely included on a menu or menu board.”<sup>74</sup> Standard menu items can also be food that is routinely offered as a self-service food or food on display.<sup>75</sup> The FDA has mandated that calories must be disclosed for standard menu items offered at covered establishments, regardless of how many servings are included in the item.<sup>76</sup> Multiple-serving foods that are routinely included on a menu or menu board or as self-service food or food on display are also included in the FDA’s definition of a standard menu item.<sup>77</sup>

### *G. Foods Not Applicable to the Menu Labeling Requirements*

The menu labeling laws do not apply to items that are not typically listed on a menu or menu board, including daily specials, temporary menu items, and custom orders.<sup>78</sup> The FDA defines “daily special” as a menu item prepared and offered for sale on a particular day which is not routinely listed on the menu and that is promoted by the covered establishment as a special menu item on that particular day.<sup>79</sup> If an item is routinely offered for sale every week on Mondays, then that item is not considered a daily special because it is routinely offered.<sup>80</sup> If a standard menu item is offered at a discounted price on a particular day, then it is also not considered a daily special.<sup>81</sup> A “temporary menu item” is defined as “a food that appears on a menu or menu board” of a covered establishment “for less than a total of 60 days per calendar year.”<sup>82</sup> Lastly, the FDA defines “custom order” as a food order that is prepared in a specific manner based upon the individual consumer’s request and which requires the restaurant or similar retail food establishment to prepare the menu item in a

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<sup>73</sup> *Id.* at 19202.

<sup>74</sup> *Id.* at 19203.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 19203-04.

<sup>78</sup> *Id.* at 19203-05.

<sup>79</sup> *Id.* at 19204.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

different way than it would normally be prepared.<sup>83</sup>

Though the menu labeling laws do not apply to condiments, oftentimes if the condiment is used in a particular menu item, its nutritional value is included in the total nutrition facts of the item. The FDA concluded that the phrase “items not listed on a menu or menu board (such as condiments and other items placed on the counter for general use)” should be read narrowly based on the parenthetical language.<sup>84</sup> This provision applies to foods, such as condiments, that are available for use by any customer in the covered establishment, regardless of the particular order of the customer, such as salt and pepper or a large ketchup dispenser placed on a counter.<sup>85</sup> However, the menu labeling laws do apply to salad dressing at a salad bar that is only available to a customer who ordered a salad as well as salad dressing at salad bars where customers pay for salad by weight, where the weight of the dressing affects the price of the item.<sup>86</sup> This condiment language does not apply to condiments that are used in the standard preparation of a standard menu item.<sup>87</sup> However, the caloric value of those condiments should already be included in the value for the standard menu item because the condiment is a part of how the standard menu item is usually prepared.<sup>88</sup>

#### IV. APPLICATION OF THE MENU LABELING LAWS TO SPORT SPECTATORSHIP

The increased popularity of eating outside of the home and the potential for expansion in sport spectatorship will have an enormous effect on how the proposed menu labeling laws will affect the way food is consumed in sport establishments in the future. Currently, there are three venues—at home, in sport bars and similar establishments, and in arenas and stadiums—where food is consumed while watching sports; however, the menu labeling laws will affect some of these places more than others. Because the menu labeling laws pertain to food eaten outside of

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 19205.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

the home, it is important to address how the menu labeling laws will be applied to sport bars and sport arenas.

*A. Application of the Menu Labeling Laws to Sport Bars and establishments*

In particular, packaged or pre-prepared food items purchased in grocery stores have nutrition labels that include the serving size and the daily recommended value for calories, fat, cholesterol, carbohydrates, dietary fiber, sugar, and protein. This, in essence, gives the consumer full disclosure over how much and what they are actually consuming. Similarly, under the proposed menu labeling laws, sports-themed food establishments with 20 chains or more are required to post the caloric and macronutrient (i.e., fat, carbohydrates, and protein) information for all menu items.

From a nutritional perspective, this will undoubtedly give consumers more control over what they are consuming. Local sports bars, however, that are not a part of a large chain would be exempt from the menu labeling laws. In an industry containing a plethora of single-entity and “mom and pop” establishments, the legislation leaves out many local and regional sport bars with less than 20 chains.

*B. Application of the Menu Labeling Laws to Sport Arenas and Stadiums*

Under the current version of the proposed menu labeling laws, sport arenas and stadiums would not be subject to the disclosure requirements. Sports stadiums and arenas would not be considered “covered establishments” as defined by the menu labeling laws because the sale of food is not the primary business activity at a sports stadium nor is greater than 50% of the establishments’ gross floor area used for the preparation, purchase, service, consumption, or storage of food. It is unclear, however, whether concession stands inside of stadiums that are part of a chain with 20 or more locations are subject to the disclosure requirements. As discussed above, if an entity is located inside a larger establishment, then the entity could be considered a separate establishment or could be part of the larger establishment where it is located.<sup>89</sup> Certain concession stands

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<sup>89</sup> *Id.*

inside of sports stadiums could be considered a separate establishment from the larger stadium and be subject to the disclosure requirements. A generic stadium grill concession stand, however, could be considered part of the larger stadium and, therefore, not subjected to the menu labeling laws.

The National Restaurant Association (“NRA”), the restaurant industry’s leading trade association, has voiced its opposition to the FDA’s proposed menu labeling laws regarding menu nutrition labeling requirements for various reasons. One of the main reasons for opposition is that entertainment venues, including sporting venues, should be covered establishments subject to the disclosure requirements.<sup>90</sup> The NRA has reasoned that Congress intended to include in the menu labeling laws all establishments that sell food in a similar manner as restaurants.<sup>91</sup> The NRA quotes Senator Harkin and Congresswoman DeLauro and claims that the purpose of the legislation was to encompass not only restaurants that were engaged primarily in the sale of food, but other retail food establishments that sell food to consumers, regardless of the percentage of floor space devoted to food or whether food sales constituted a large or small portion of the establishment’s total business:<sup>92</sup>

The aim [of the menu labeling laws] was not to confine the scope of the law solely to restaurants or other establishments that were engaged primarily in the sale of food, but to apply the law broadly to restaurants as well as other retail food establishments that sell food to consumers, regardless of the percentage of floor space devoted to food and regardless of whether the food sales constitute a large or small portion of the establishments’ total business.<sup>93</sup>

However, it still seems unlikely that a stadium would be covered under the NRA’s proposal, since the individual stadiums would not be a part of a chain of 20 or more establishments.

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<sup>90</sup> Letter from Dawn Sweeney, Pres. & CEO, Natl. Restaurant Assn. to Margaret A. Hamburg, M.D., Commr., U.S. Food and Drug Administration, 2 (July 5, 2011), <http://www.restaurant.org/advocacy/issues/issue/?Issue=menulabel>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 4.

<sup>93</sup> *Id.* at 4.

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## V. CONCLUSION

The increased popularity of eating outside of the home and the potential for expansion in sport spectatorship will have an enormous effect on how the proposed menu labeling laws will affect the way food is consumed in sport establishments in the future. This mandatory communication of fitness on the sport industry will affect the way spectators consume sport, making fitness even more essential to the sport landscape. With the influx of laws and regulations aimed at fighting obesity in America, spectators will be forced to receive fitness-related messages with the goal of informing and influencing them to choose foods that have a lower caloric content.