

## MEMORANDUM

**From:** Joseph A. Levitt  
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**Date:** July 12, 2018

**Re: FDA Issues Proposed Rule on Front-of-Pack Calorie Disclosures Used for Vending Machine Labeling Compliance**

The Food and Drug Administration (FDA) is proposing to revise the type size requirements for front-of-pack (FOP) calorie declarations that are used to comply with the vending machine calorie labeling requirements. <sup>1/</sup> The proposed rule would require such calorie declarations to be at least 150% the size of the net quantity of contents statement (i.e., 1.5 x the size of the net weight). This proposed change was prompted by industry concerns that the current type size requirement for FOP calorie declarations – of at least 50% of the size of the largest printed matter on the label <sup>2/</sup> – is impractical, needlessly burdensome, and would disrupt existing voluntary industry front-of-pack nutrition labeling programs. The existing programs require FOP calorie declarations to appear in a type size ranging from 100 to 150% of the size of the net quantity of contents statement. <sup>3/</sup>

Importantly, the proposed rule only applies when the FOP calorie declaration is used to comply with the vending machine labeling rule, such as when consumers can view the packaged food through a glass-front vending machine. <sup>4/</sup> By way of brief background, the vending machine labeling final rule requires vending machine operators that own or operate 20 or more vending machines (or that voluntarily register with FDA to be subject to the final rule) to provide calorie information for certain articles of food sold from vending machines. Vending machine operators do not, however, need to provide such calorie information if the purchaser can view calorie information on the front of the package before making his or her selection. Although the vending machine labeling rule applies to vending machine operators, and not directly to food manufacturers, as a practical matter it may be more efficient for the food manufacturer to provide visible nutrition information via a FOP calorie declaration when the food is sold from a glass-front vending machine. The proposed rule addresses the type size for this “visible nutrition information” exemption.

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<sup>1/</sup> 83 Fed. Reg. 32221 (July 12, 2018).

<sup>2/</sup> 21 C.F.R. § 101.8(b)(2).

<sup>3/</sup> In a June 28, 2016 letter to Susan Mayne, Ph.D., Director, Center for Food Safety and Applied Nutrition (CFSAN) FDA, a coalition of trade associations including the Grocery Manufacturers Association, American Beverage Association, National Confectioners Association, National Automated Merchandising Association, and SNAC International, asked that FDA revise the type size requirement to be at least 150% the size required for the net quantity of contents.

<sup>4/</sup> It would not apply when the vending machine operator otherwise provides calorie information in compliance with the vending machine labeling rule or when the article of food is not sold in covered vending machines.

FDA proposes a compliance date of January 1, 2020 for any final rule resulting from this rulemaking, the same compliance date as for the new nutrition labeling requirements for large manufacturers. In the meantime, pending completion of the rulemaking, the agency will issue enforcement discretion for products sold in glass front vending machines that bear an FOP calorie disclosure (provided they comply with the “visible nutrition information” exemption requirements other than the type size requirement).

The agency is providing a 75 day comment period on the proposed rule, with comments due September 25. The proposed rule states that “late, untimely filed comments will not be considered,” suggesting the agency wants to issue a final rule as quickly as possible.

Note that FDA is separately considering amending the vending machine labeling requirements as applied to gums, mints, and roll candy products sold in glass front machines in packages that are too small to bear FOP labeling. FDA intends to exercise enforcement discretion at least until January 1, 2020 with respect to these products, pending further consideration of this issue.

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We will continue to monitor FDA’s implementation of the vending machine labeling requirements. Please contact us if you have any questions regarding this or any other matter.