

MEMORANDUM

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Re: FDA Announces Temporary Flexibility Regarding Nutrition Labeling Due to COVID-19 Pandemic

The U.S. Food and Drug Administration (FDA) announced yesterday two policies to provide flexibility with respect to nutrition labeling requirements during the COVID-19 pandemic.¹ First, the agency committed to work cooperatively with all manufacturers for the remainder of the year regarding the use of updated Nutrition and Supplement Facts labels and will not focus on enforcement actions during this time. FDA had previously announced this form of enforcement discretion for the first six months of implementation after the January 1, 2020 compliance date, which has now been extended until January 1, 2021.² Second, FDA also issued a new guidance document that details the conditions under which a restaurant or food manufacturer may sell packaged food labeled for foodservice use (i.e., without nutrition labeling) directly to consumers.³ We summarize this guidance below.

¹ FDA Constituent Update, FDA Provides Temporary Flexibility Regarding Nutrition Labeling of Certain Packaged Food in Response to the COVID-19 Pandemic, March 26, 2020, *available at* <https://www.fda.gov/food/cfsan-constituent-updates/fda-provides-temporary-flexibility-regarding-nutrition-labeling-certain-packaged-food-response-covid/>.

² For our previous memorandum on FDA's form of enforcement discretion for the new nutrition labeling rules, see HL Memo, FDA Announces Form of Enforcement Discretion for First Six Months After New Nutrition Labeling Rule Compliance Date, October 24, 2019, *available at* <https://www.hlfoodlaw.com/2019/10/fda-announces-form-of-enforcement-discretion-for-first-six-months-after-new-nutrition-labeling-rule-compliance-date/>.

³ FDA Guidance for Industry, Temporary Policy Regarding Nutrition Labeling of Certain Packaged Food During the COVID-19 Public Health Emergency, March 2020, *available at* <https://www.fda.gov/media/136469/download>.

Flexibility to Allow Foods Labeled for Food Service to be Sold Directly to Consumers

Restaurants

FDA does not intend to object to the sale of packaged food that lacks a Nutrition Facts label by restaurants (i.e., food labeled for foodservice use) directly to consumers provided that the food:

- Is not labeled with any nutrition claims;
- Contains other required information on the label, as applicable:
 - Statement of identity;
 - Ingredient statement;
 - Name and place of business of the food manufacturer, packer, or distributor;
 - Net quantity of contents; and
 - Allergen information required by the Food Allergen Labeling and Consumer Protection Act.

This guidance does not apply to food prepared by restaurants. Restaurants may reuse the original labels they received for the food, or provide the above information on labels that it creates or that are provided by the manufacturer.

Food Manufacturers

To facilitate the distribution of food during the COVID-19 pandemic from food manufacturers that have inventory on hand labeled without nutrition labeling (i.e., for foodservice use), FDA does not intend to object to the sale of packaged food without a Nutrition Facts Label if the food:

- Is not labeled with any nutrition claims
- Contains other required information on the label, as applicable:
 - Statement of identity;
 - Ingredient statement;
 - Name and place of business of the food manufacturer, packer, or distributor,
 - Net quantity of contents, and
 - Allergen information required by the Food Allergen Labeling and Consumer Protection Act.

The above guidance applies to inventory that a food manufacturer has on hand; however, FDA's guidance also provides that if retail packing for certain foods is unavailable, FDA does not intend to object to the further production of food labeled for use in restaurants that is intended to be sold other than to restaurants (i.e., directly to consumers) until retail packaging is available.

FDA's guidance is intended to remain in effect only for the duration of the public health emergency related to COVID-19 declared by the U.S Department of Health and Human Services (HHS) and any renewals made by the Secretary in accordance with the Public Health Service Act.

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We will continue to monitor FDA developments relevant to the food industry during the COVID-19 pandemic. If you have any questions on this or any other matter, please do not hesitate to contact us.