

## FDA Relaxes Food-Labeling Rules During COVID-19 Crisis

By Joyce Hanson

*Law360 (April 7, 2020, 6:24 PM EDT)* -- The U.S. Food and Drug Administration has temporarily eased its policies on nutrition and menu labeling to help calm consumer fears about product shortages, keep restaurants in business and avoid food waste during the COVID-19 pandemic.

The FDA said its recent guidance to the food industry aims to adjust the imbalance of supply and demand as people self-quarantine at home and avoid going out in public except to focus on essentials such as buying groceries or picking up prepared meals.

The changes allow for the sale of foods intended for restaurant use directly to retail consumers, and relax menu-labeling regulations so that restaurant chains can create new food items that support takeout-and-delivery-only services.

During the coronavirus pandemic, the FDA wants to cross the regulatory bridge that usually separates consumers from the food service industry, according to Sarah L. Brew of Faegre Drinker Biddle & Reath LLP, who represents food industry clients on labeling and other matters.

Typically, food that's not labeled for consumer sale can't be sold directly to consumers, but the agency now seeks to fill increasingly empty grocery store shelves by relaxing labeling regulations so that commercial food service producers and manufacturers can send certain food labeled for food service use to retail businesses for consumers to buy, Brew told Law360 on Monday.

"The FDA has done an amazing job of being flexible and accommodating consumer and food industry needs as a result of the COVID-19 crisis," she said. "Right now, there's a shortage in the supply chain on the retail side for consumer use in grocery stores, and on the food service side there's an excess of supply in restaurants, hotels, casinos and airports."

After President Donald Trump declared COVID-19 a national emergency on March 13, the FDA said it decided to implement its temporary guidance without comment in order to act quickly. The agency said prior public participation for the guidance was neither feasible nor appropriate, but it will solicit comments, review them all and make revisions as needed.

The guidance comes as an FDA public information campaign urges consumers not to succumb to panic buying and tells them that there are no nationwide food shortages. Production of food for people and animals is up and running throughout the country as manufacturers and retailers continue to replenish

supplies, restock shelves and work with the agency to monitor the food supply for any shortages, according to the FDA.

Specifically, the agency's temporary policy on nutrition labeling of many packaged foods during the crisis, released March 26, states that it "does not intend to object" to restaurants and food manufacturers' sale of inventory on hand that is labeled for use in restaurants and lacks a nutrition facts label. Such labels are normally required on food products sold to consumers.

John Fuson, a Crowell & Moring LLP partner and former associate chief counsel at the FDA, noted in a March 27 coronavirus comment that the relaxed nutrition labeling rule nevertheless calls for food packages to include a statement of identity, ingredients, name and place of the business, net quantity of contents and allergen information.

"FDA has also indicated that if retail packaging for certain food products is unavailable, it will not object to further production of such food products until the retail packaging is available," Fuson wrote.

Separately, the FDA's policy on nutrition labeling of standard menu items in chain restaurants, which is required under the Affordable Care Act, was temporarily relaxed on April 1. This will help chains with 20 or more locations shift to takeout and delivery business innovations, as alternative ingredients and new foods on their menus would normally require more nutrition information.

"Flexibility in the rules during this national crisis is extremely helpful," Laura Abshire, the National Restaurant Association's director of food nutrition and sustainability policy, said in a statement. "Right now, restaurants are working extremely hard to ensure they are safely serving their customers and taking care of their communities."

The relaxed policies are in effect only for the duration of the COVID-19 emergency declared by the U.S. Department of Health and Human Services.

Brew said the temporary labeling rules won't become permanent because they were not subject to formal rulemaking, which includes a notice and comment period for industry and consumers to contribute their thoughts.

"The FDA has been very clear that it is making these temporary changes to address COVID-19 food supply disruptions, and that's why the agency is reaching out now to industry groups, companies and attorneys to quickly address the crisis," she said.

--Editing by Alanna Weissman.