Regulation Review

Final ACA Calorie Labeling Rules

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Just two days before most Americans consumed their highest caloric intake of the year, the Food and Drug Administration (FDA) released its long awaited calorie labeling rules for vending machines and certain chain food service providers. The rules require vendors to provide a conspicuous, and often extraneous, calorie label for their products. These rules have always been a curious addition to the Affordable Care Act (ACA), as there's no clear linkage to

the law's primary goal of health insurance reform. Originally proposed in April 2011, the final versions have taken more than three years to find their way to the Federal Register. Together, the unofficial, pre-publication versions of the rules are 525 pages.

BREAKDOWN

Proposed Rules

- Vending Machine Costs: $398 Million
- Vending Machine Paperwork: 842,048 hours
- Menu Labeling Costs: $757.1 Million
- Menu Labeling Paperwork: 1,341,762 hours

Final Rules

- Vending Machine Costs: $531.1 Million
- Vending Machine Paperwork: 1,507,788.5 hours
- Menu Labeling Costs: $1.2 Billion
- Menu Labeling Paperwork: 498,508 hours

Total Net Change: *Increased costs by $542 million*

ANALYSIS

Considering how FDA had the dockets for these rules open for input for more than three years, it is hardly surprising to see substantial shifts in costs and paperwork burdens. These shifts largely seem to come from changes in certain assumptions. Both rules underwent a substantial increase in their total costs. The table below illustrates the changes in the underlying estimates.

	Proposed Rule	Final Rule	Difference
# of Vending Machine Operators	10,800	11,960	+ 1,160
# of Vending Machines	5.6 million	5.98 million	+ 380,000
# of Menu Labeling Establishments	278,600	298,600	+ 20,000
# of Menu Labeling Chains	1,640	2,130	+ 490

These shifts do include an increase in the number of establishments and a few updated estimates. For instance, FDA bases its new vending machine figures off of data from the National Automated Merchandising Association. There is no clear explanation given for their expanded figures on the menu labeling rule. However, one could speculate that it is merely a function of the industry's expansion over the past three and a half years. The paperwork decrease is largely due to adjusted estimates of the per response time. The estimated time for third-party calorie verification increases significantly in the vending machine rule, but that increase is more than offset by FDA dialing down its menu labeling estimates due to fewer burdens expended in maintaining records.

In terms of covered activities under the menu labeling rule, there is an attempt to clarify one of the proposed rule's more contentious issues: the rule's application in grocery or convenience stores. The final rule adjusts the definition of "restaurant-type food" to focus on recently prepared, individual consumption servings. The following table gives certain examples:

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However, much of this delineation depends on somewhat subjective determinations regarding the size of "individual consumption," or the difference between "bulk-bin" and "self-service" items. Further clarification and distinction between products is likely necessary to avoid this ambiguity.

One option that the rule discusses in its Regulatory Impact Analysis (RIA) is to only include certain establishments that clearly fit into the definition of chain restaurants. The corresponding total costs under this scenario would be $614.8 million, or approximately half of the actual rule's total. While that option would cut costs by roughly 50 percent, it would only diminish FDA's estimated benefits by one third.

Behind the overall top-line estimates, there are real monetary impacts for covered entities and consumers. As the American Action Forum (AAF) has noted before, a failure to properly label covered items could leave an establishment with a $1,000 fine due to "misbranding." AAF also illustrated the diligence required in producing the proper labels in this infographic. Beyond the potential punitive implication for operators and producers, FDA notes in the menu labeling rule's Regulatory Impact Analysis (RIA) that:

> We fully expect that some proportion of the costs imposed by the regulation will be passed on to consumers, who are generally willing to accept some degree of price increase in exchange for an increase in the nutrient content information of standard menu items.

FDA does not provide a quantified estimate of this potential price increase. However, examining the per-entity cost implications of each rule could provide some context on that issue as especially impacted establishments may have to adjust their business plan significantly.

The Regulatory Flexibility Act (RFA) analysis in both rules states that they "will have a significant economic impact on substantial number of small entities." For the menu labeling rule, FDA finds that "at least two thirds" of the covered entities would be small businesses. This is largely due to the prevalence of franchised entities that, while part of an overall chain, essentially operate as an independent small business.

The implications for smaller firms like these can be stark. FDA finds that, on average, the menu labeling rule imposes $49,085 in annual per-entity costs with higher-end estimates reaching $77,245. The typical food service employee earns a mean wage of $22,040 annually. Thus, this rule essentially costs a business roughly the same amount as 2 to 3.5 employees. According to Census data for the corresponding industry code (NAICS 722), approximately half of all food service establishments employ fewer than 10 employees. Add in food service's notoriously low profit margins, and that is a lot to manage when attempting to balance the books.

For vending machine operators, FDA finds far less acute implications on a per-entity basis. According to their estimates, per-operator costs approach $11,460, or roughly one-third of a typical vending machine worker's mean annual wage. Nonetheless, the agency also finds that 97 percent of covered entities are "small businesses" under the Small Business Administration's criteria. Census data show that approximately 80 percent of all vending machine establishments employ fewer than 10 workers.

The table below displays the states most affected by the vending machine rule.

State	Cost for Vending Machine Operators
Florida	$41.8 million
Texas	$40.5 million

State	Cost for Vending Machine Operators
California	$36.7 million
New York	$33.0 million
Pennsylvania	$27.5 million
Illinois	$26.4 million
Ohio	$25.6 million
North Carolina	$19.7 million
Tennessee	$16.8 million
Michigan	$15.9 million

For a set of rules that have a limited connection to the ACA's stated purpose, they have been among the most drawn-out regulatory actions under the law. While the years of input have provided plenty of opportunity for fine-tuning, the result still has significant issues: higher costs, questions that will likely land in a courtroom soon, and substantial burdens on many small businesses.