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**On Behalf of  
Food Marketing Institute  
&  
National Grocers Association**

**Examining H.R. 2017, the Common Sense Nutrition Disclosure Act of 2015**

**10:00am, June 4, 2015**

**Subcommittee on Health  
House Energy & Commerce Committee  
2123 Rayburn House Office Building  
Washington, D.C.**

## **INTRODUCTION**

Good morning Chairman Pitts, Ranking Member Green and Health Subcommittee Members,

My name is Israel O'Quinn, and I am Director of Strategic Initiatives for K-VA-T Food Stores, Inc. K-VA-T Food Stores is headquartered in Abingdon, Virginia, and we currently operate 106 retail supermarkets, under the banner of Food City, throughout the tri-state regions of Southwest Virginia, Southeast Kentucky, and Northeast Tennessee. In addition to our retail outlets we operate a distribution center and water bottling plant in Abingdon, Virginia. In total, we employ over 13,000 associates. KVAT is committed to our customers, to our associates and to being community-oriented. We are involved in efforts to source locally but also give back by partnering with non-profit organizations throughout our market area, such as recently working with local growers and United Fresh's Let's Move Salad Bars to Schools program to help donate salad bars to multiple schools throughout our region.

I am also here as one of the voices of the Food Marketing Institute, who are a diverse spectrum of single owner grocery stores, large multi-store supermarket chains and mixed retail stores, as well as the National Grocers Association, which is comprised of the retailers and wholesalers that make up the independent channel of the supermarket industry, and the overarching supermarket industry who operate nearly 40,000 stores and employ more than 3.5 million people where food is sold in the United States.

We greatly appreciate the work you are doing to consider the impact of FDA's final menu labeling regulations on grocery stores and the need for enactment of the *Common Sense Nutrition Disclosure Act of 2015* (H.R. 2017).

The key to all of this from my perspective is the **common sense** part of this legislation. Grocery stores are going to deliver what customers want in the format they want it. For the government to spend hundreds of pages of federal register text to prescribe a type size and a "succinct statement" that has to accompany the calorie information and the written offer of additional nutrition information available upon request all adjacent to or directly affixed to an item that may not have a menu board to label as part of a menu labeling law isn't common sense at all.

This legislation seeks to put the common sense back into the process. About 95% of the foods in a grocery store have not only calorie information, but also the full Nutrition Facts panel which lists fat, sodium, carbohydrates and more. Many of the remaining items are sourced from the store. If cantaloupe, or any other fruit or vegetable, gets ripe in the produce department, we cut it up and put it in the salad bar. These are not the issues Congress was trying to address by incorporating the chain restaurant menu labeling legislation into the 2000+ page Affordable Care Act.

Throughout our stores and across our company we have a team of food safety and quality assurance personnel focused on food safety. That includes implementation of the FDA Food Safety and Modernization Act (FSMA), compliance with Country of Origin Labeling, Ingredient Labeling, Allergen Labeling, Bioterrorism Recordkeeping, proposed updates to the Nutrition Facts panel, as well as Recall Notifications. We also have our own safety and quality standards that go above and beyond these laws.

What does any of this have to do with FDA's menu labeling regulations? Well, these are all top priorities of the supermarket industry where we devote a lot of attention and resources. They are also regulations that are not applied to chain restaurants. So when FDA takes a chain restaurant menu labeling law and stretches its regulations to grocery stores on top of all of the other food safety and nutrition laws that we abide by, it shouldn't surprise anyone that "the glove doesn't fit."

#### **SUPERMARKET INDUSTRY POSITION AND ENAGEMENT ON CHAIN RESTAURANT MENU LABELING**

The supermarket industry is constantly competing with each other to be at the forefront of providing customers with what they want and need, so our concerns with "menu labeling" regulations are with FDA effectively mandating the standardization of foods that removes the creativity, passion and regional flavors our customers love.

Food City's Healthy Initiatives department has already been actively addressing nutritional dietary needs of both our customers and our associates. We have a substantial locally grown produce project with local farmers who have converted their tobacco fields to expand and promote fresh fruits and vegetables, which are cut up in-store and offered through an expanded assortment salad bar and in convenient "grab-and-go" items. This locally grown initiative began fourteen years ago and we purchased approximately \$750,000 worth of product at that time. Now, we are making purchases that near \$6,000,000 which provides local, healthy products to our customers.

We use the NuVal nutritional scoring and shelf-tag system, so customers can make quick and easy nutritional comparisons between foods. We have invested significant effort and resources in providing NuVal to our customers so they can make quick, yet highly-informed decisions based on nutritional value. We also offer a wide variety of gluten-free and organic products, which include dairy, beverages, as well as numerous ingredients and recipes for breakfast and dinner options.

This is all on top of approximately 95% of the foods sold throughout our stores already being labeled with Nutrition Facts, which has far more information than calories, and is also undergoing revisions by FDA.

Our concerns with mandating "menu labeling" at grocery stores is that FDA has designed these regulations for a format with limited offerings, standard portions, and, frankly, pre-printed menus. This

just doesn't fit a grocery store operation that carries, on average, over 36,000 food items that vary and alter the content of salad bars or other freshly made items for the customer's choosing.

FDA's final rule published on Dec. 1, 2014, did indeed stretch the chain restaurant menu labeling approach to grocery stores, and our concerns were realized and questions multiplied.

For example, we see our company as a collection of stores with qualities that make each of them unique. We encourage our chefs and bakery-deli departments to offer items that reflect the creativity, entrepreneurship, and local foods appreciated by our customers. There are some items that we may only sell at one or two stores, and while the same name may be listed, the ingredients or recipe may vary. Under FDA's rules, these would all be considered "standard menu items" and regulated as such.

Some of this variance is also the result of what's available in the store, particularly in the produce area or meat case. If we have a surplus of cucumbers or berries, you're going to start seeing a lot more of them along the salad bar. Under the regulations grocery stores still will not only need to produce and update signage, we'll need to perform nutritional analyses and ensure these profiles are documented, maintained and available upon request. These are all things that take away creativity and reduce customer interest by driving standardized food. The shelf life on the items referenced is extremely short, and instead of risking an action by the FDA, we would likely be forced to shrink the product. Grocers are particularly concerned with food waste, and that is the last thing we want to happen.

Some of our stores have considered putting a sign, book or electronic kiosk listing calorie counts for all items above or at the end of the salad bar instead of putting a label on every ladle and tray, which are constantly moving and getting switched out. Based on what FMI has been told by FDA, this would not be considered compliant under FDA's rules. We've also considered using scale-labels from our deli-area for grab-and-go items like sandwiches made from the deli early in the day, but with a FDA mandated font size, the font-size would not be compliant without having to completely replace all of our scales and labels. To put it bluntly, this is going to be a very expensive endeavor.

And due to the high variability and potential for human error that inevitably comes with freshly preparing foods, even when using the same recipe and ingredients, we would like the ability to take corrective actions before enforcement actions are taken by FDA or by state and local health officials, who choose to enforce the menu labeling law.

Based on supermarket industry analysis of the current FDA final menu labeling regulations, FMI estimates the compliance costs for the overall supermarket industry to run up to \$1 billion initially, resulting from FDA requiring 150-200 individual items, on average, per store across 30,000 stores to undergo nutrition analysis, ranging from \$500-\$1,500 per items, plus the recordkeeping, signage, labeling and staff training. This does not account for the standardization process that stores will undergo to lower the liability risks of individual store offerings or for the timing and process for all of this to occur. In addition, the lack of industry guidance from FDA ever since the rule was released has compressed the compliance timeline, driving costs higher. Since FDA published the final regulations outside our normal budgeting cycle, these compliance costs were not accounted for and will directly impact our store operations, customer service, and food prices.

You may not be aware that grocery stores operate on a profit margin that averages 1%. There is very little room for us to absorb significant costs such as the ones presented by menu labeling. When you operate on a razor-thin margin, you simply don't have the luxury of spending large amounts of money

on things that return no value. These costs are ultimately passed along to the consumer, and in an economy that contracted at 0.7% last quarter, consumers can't afford to be paying more and getting practically nothing in return.

We've raised these concerns, as well as many additional technical questions with FDA, through our trade associations, including store tours with a team of FDA officials, several face-to-face meetings with industry compliance teams, and multiple conversations and webinars. However, we have not received any guidance or answers from FDA that would allow us to begin taking steps in order to be in compliance by December of this year.

Thankfully, the *Common Sense Nutrition Disclosure Act of 2015* (H.R. 2017), introduced by Representatives Cathy McMorris Rodgers and Loretta Sanchez and co-sponsored by many on this Subcommittee, attempts to correct many of these problems.

The *Common Sense Nutrition Disclosure Act of 2015* helps address fundamental problems with FDA's final menu labeling regulations, such as protecting grocery stores that do not have menus or menu boards, limiting the regulations to foods that are truly standardized at 20 or more locations, providing flexibility on the placement and display of nutritional information where customers make their purchasing decisions, and allowing adequate time to properly implement the law and take corrective actions as necessary.

I thank you for allowing me to testify today about the impact of FDA menu labeling regulations, and I appreciate the Subcommittee's consideration of this legislation. I would be pleased to take your questions.

**Summary of Supermarket Industry Testimony Regarding  
Examining H.R. 2017, the Common Sense Nutrition Disclosure Act of 2015**

- The supermarket industry supports the *Common Sense Nutrition Disclosure Act of 2015* (H.R. 2017) and appreciates the Health Subcommittee considering the impact of FDA's final menu labeling regulations on grocery stores.
- This legislation seeks to put the common sense back into the process. Most of the foods in a grocery store have not only calorie information, but also the NLEA Nutrition Facts panel which lists fat, sodium, carbohydrates and more. Many of the remaining items are sourced from the store. If cantaloupe, or any other fruit or vegetable, gets ripe in the produce department, they are cut up and used in the salad bar. These are not the issues Congress was trying to address by incorporating the chain restaurant menu labeling legislation into the Affordable Care Act.
- Food City's Healthy Initiatives have already been actively addressing nutritional dietary needs. We have been substantially expanding and promoting locally grown fresh fruits and vegetables, which are cut up in-store and offered through an expanded assortment salad bar and in convenient "grab-and-go" items. We use the NuVal nutritional scoring and shelf-tag system, so customers can make quick and easy nutritional comparisons between foods. This is on top of 95+% of the foods sold throughout our stores already being labeled with Nutrition Facts, which has far more information than calories and is also undergoing FDA revisions.
- Our concerns with mandating "menu labeling" at grocery stores is that FDA has designed these regulations for a format with limited offerings, standard portions, and, pre-printed menus. These are all things that take away creativity and reduce customer interest by driving standardized food.
- FDA's menu labeling rule doesn't fit a grocery store operation that carries, on average, over 36,000 food items that vary and alter the content of salad bars or other freshly made items. Store chefs and bakery-deli departments are empowered to offer items that reflect the local foods and tastes of their community. There are some items that we may only sell at one or two stores, and while the same name may be listed, the ingredients or recipe may vary. Under FDA's rules, these would all be considered "standard menu items" and regulated as such.
- Some of this variance is also the result of what's available in the store, particularly in the produce area or meat case. If we have a surplus of cucumbers or berries, you're going to start seeing a lot more of them along the salad bar. Under FDA's regulations, grocery stores still will need to perform nutritional analyses, to create and update signage, and to ensure these profiles are documented, maintained and available upon request. The shelf life on the items referenced is extremely short, so instead of risking an action by the FDA, stores would likely be forced to "shrink" the product.
- Some of our stores have considered putting a prominent sign, book or electronic kiosk listing calorie counts for all items above or at the end of the salad bar but this would not be considered compliant under FDA's rules. We've also considered using scale-labels from our deli-area for grab-and-go items like sandwiches made from the deli early in the day, but with a FDA mandated font size, this would not be compliant.
- And due to the high variability and potential for human error that inevitably comes with freshly preparing foods, we would like the ability to take corrective actions before enforcement actions are taken by FDA or by state and local health officials, who choose to enforce the menu labeling law.
- The supermarket industry has raised these concerns and other technical questions with FDA, but has not received positive response from FDA that would allow us to begin and complete the compliance process by December, 2015.
- The *Common Sense Nutrition Disclosure Act of 2015* helps address fundamental problems with FDA's final menu labeling regulations, such as protecting grocery stores that do not have menus or menu boards, limiting the regulations to foods that are truly standardized at 20 or more locations, providing flexibility on the placement and display of nutritional information where customers make their purchasing decisions, and allowing adequate time to properly implement the law and take corrective actions as necessary.