April 1, 2021

Dr. Susan T. Mayne
Director, Center for Food Safety and Applied Nutrition
Food and Drug Administration
Department of Health and Human Services
Silver Spring, Maryland 20993

Re: Availability of Nutrition Information for Foods from Chain Restaurants Purchased through Third Party Platforms

Dear Dr. Mayne:

The Center for Science in the Public Interest ("CSPI"),[1] American Heart Association,[2] American Public Health Association,[3] Center for Digital Democracy,[4] Consumer Federation of America,[5] and Consumer Reports[6] write to urge the Food and Drug Administration ("FDA") to provide interpretative guidance concerning the nutrition labeling requirements for menu items in the Federal Food, Drug, and Cosmetic Act ("FDCA"), as amended by the Patient Protection and Affordable Care Act ("ACA").

Specifically, we request that FDA issue guidance clarifying that these requirements are applicable to restaurant menus listed on third party platforms ("TPPs"), such as DoorDash, Seamless, Grubhub, and Uber Eats. Further, the guidance should make clear that both chain restaurants *and* TPPs are responsible for complying with the nutrition labeling requirements.

Our request is both timely and important. Use of TPPs to order restaurant food has soared in recent years,[7] and online ordering is safer than ordering in-person to prevent the spread of COVID-19. However, many chain restaurants and TPPs fail to consistently provide nutrition information when menus are listed on TPPs (*see* Appendix), significantly undercutting the public health goals of nutrition labeling.

Below, we provide a brief description of the purpose and coverage of the FDCA's nutrition labeling requirements; discuss the public health benefits of nutrition labeling on TPP menus; and establish that chain restaurants and TPPs are already required to provide such labeling.

I. Purpose and Coverage of the FDCA's Nutrition Labeling Requirements

In 2010, the ACA amended the FDCA to require certain chain restaurants ("Covered Establishments")[8] to provide nutrition information to customers. Specifically, the FDCA requires Covered Establishments to (1) disclose on menus the number of calories contained in standard items; (2) provide, upon request, more detailed nutrition information (*e.g.*, sodium, saturated fat, and sugars); and (3) display two statements on menus, one noting that more detailed nutrition information is available upon request and the other indicating that 2,000 calories a day is used for general nutrition advice, but that calorie needs vary.[9] In defining "menu," the FDA specifies that this definition includes physical menus as well as menus on the Internet.[10]

According to the FDA, the nutrition labeling requirements ensure that consumers have "calorie and other nutrition information available to [them] in a direct and accessible manner to enable [them] to make informed and healthful dietary choices."[11] They also encourage Covered Establishments to "reduce the calorie content of existing items through reformulation or by decreasing portion size."[12]

For the menu labeling requirements established under the ACA to have their intended impact, consumers must have easy access to the labeled information. However, until the FDA issues interpretive guidance confirming that menus listed on TPPs are required to list nutrition information, many Covered Establishments will not do so, causing a gap in access to information. This gap has become increasingly important as more Americans order meals through TPPs during the COVID-19 pandemic.

II. Nutrition Labeling on TPP Menus will Provide Important Public Health Benefits

Calorie labeling on restaurant menus appears to modestly reduce calories purchased.[13] This is important because the average daily calories consumed by people in the United States has significantly increased since the 1970s,[14] which may be a contributor to increased rates of obesity and related chronic diseases over the same period.

A meta-analysis of three randomized controlled trials evaluating the impact of calorie labeling on energy intake found that including calorie counts on menus reduced calories purchased by 47 calories, or 8 percent per 600-calorie meal.[15] Additionally, a quasi-experimental longitudinal study found a decrease of 60 calories per transaction following implementation of the menu labeling rule, though this was partially attenuated by a gradual weekly increase in mean calories per transaction over the next year.[16]

Even a small reduction in average daily calories consumed could have a meaningful impact on public health. Studies estimate that a 200-calorie per day energy gap was associated with the increase in average bodyweight among U.S. adults between 1975 and 2010,[17] and that an average reduction of just 41 calories per day could prevent an increase in average weight among U.S. youth (above the average weight among U.S. youth in 2007-2008).[18]

While Covered Establishments have largely complied with the FDCA's nutrition labeling requirements on their physical menus and menus on their own websites, many Covered Establishments and TPPs fail to provide nutrition information on menus listed on TPPs (*see*

Appendix). Because TPPs play a large and increasingly important role in the modern food landscape, it is essential to ensure that Covered Establishments and TPPs provide nutrition information on TPP menus.

The role that TPPs play in American food consumption cannot be overstated. As of 2019, over 60% of young adults used TPPs.[19] Since the start of the COVID-19 pandemic, 80% of non-pizza orders were done through a TPP.[20] However, people who order their food through a TPP may not have point-of-sale access to the same nutrition information as those who order food from a restaurant menu.

A visual comparison between menus on restaurants' websites and TPPs demonstrates this point. For example, Chipotle allows customers to order food *either* through its company website (Chipotle.com) or through DoorDash or Seamless. When ordering from Chipotle.com, customers can view the calorie count for each burrito topping, which allows consumers to make detailed, informed choices.[21]

Yet Chipotle's menus on DoorDash[22] and Seamless[23] do not include the calorie counts for such items. As a result, a consumer ordering from Chipotle through a TPP—who is in a virtually identical situation to a consumer ordering directly from Chipotle's online menu—does not have access to this calorie information at the point of purchase. This arbitrary distinction, as will be explained below, has no basis in the law and undermines the public health goals of nutrition labeling.

III. The Nutrition Labeling Requirements Cover Restaurant Menus on TPPs

While TPPs are not Covered Establishments, a menu on a TPP is not the TPP's menu. It is the restaurant's menu. It is the restaurant that sets the items and their cost, not the TPP. Because a restaurant's menu on a TPP meets the statutory definition of "menu," the nutrition labeling requirements apply to Covered Establishments' menus on TPPs.

The FDA's nutrition labeling implementing regulations define "menu" as follows:

> Menu . . . means the primary writing of the covered establishment from which a customer makes an order selection, including, . . . *menus on the Internet*. Determining whether a writing is [a menu] . . . depends on a number of factors, including whether the writing lists the name . . . and the price of the standard menu item, and whether the writing can be used by a customer to make an order selection at the time the customer is viewing the writing.[24]

The above definition of "menu" includes Covered Establishments' menus placed on TPPs. As an initial matter, there is no question that a Covered Establishment's menu on its own delivery website or application would be considered a "menu," as the definition explicitly includes "menus on the Internet."[25] As the FDA has stated, "if consumers can order from a covered establishment online . . . using a writing of the covered establishment on the Internet as the primary writing from which he or she makes his or her order selection, then the writing on the Internet is a menu for the purposes of" the nutrition labeling requirements.[26] Because restaurants generally develop and control the menu that consumers view on TPPs, there is no legal

distinction between the restaurant's online menu and the one it develops for TPPs.

The FDA has also made clear that the "definition [of menu] is adequate to capture methods and media other than those specifically listed in that definition, so long as such methods and media otherwise satisfy the criteria in the definition."[27] A menu on a TPP "satisf[ies] the criteria in the definition." The menu (1) is a "primary writing";[28] (2) lists the names of standard menu items; (3) lists the prices of standard menu items; and (4) "can be used by a customer to make an order selection at the time the customer is viewing the writing."[29] In short, the FDCA's nutrition labeling requirements for menus apply to Covered Establishment's menus on TPPs.

Moreover, both Covered Establishments and TPPs are responsible for complying with the nutrition labeling requirements. Foods that do not comply with the nutrition labeling requirements are "misbranded."[30] The FDCA prohibits:

- the "introduction or delivery for introduction into interstate commerce of any food . . . that is . . . misbranded;"
- the "receipt in interstate commerce of any food . . . that is . . . misbranded, and the delivery or proffered delivery thereof for pay;" and
- "doing of any other act with respect to . . . a food . . . if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being . . . misbranded."[31]

Entities, moreover, can be held liable for aiding and abetting these prohibited acts and neither "knowledge nor intent" is required.[32]

As the FDA has explained to members of the cosmetic industry, interpreting the same prohibited acts provisions of the FDCA, "nearly everyone involved . . . , such as manufacturers, packers, distributors, and retailers, is responsible for assuring that he or she is not dealing in products that are . . . misbranded, even if someone else caused the . . . misbranding in the first place."[33] As a result, both Covered Establishments and TPPs (which effectively control the labeling at issue and deliver the "misbranded" food) bear responsibility for ensuring compliance with the nutrition labeling requirements.

However, because there are many Covered Establishments and TPPs that are not fulfilling the requirement to ensure that menus on TPPs meet these standards (*see* Appendix), interpretative guidance clarifying this responsibility is needed.

IV. Conclusion

The nutrition labeling requirements are essential to allowing consumers to make informed choices about their diets and to providing incentives for industry to reformulate in a more healthy direction. Because TPPs play a large and rapidly growing role in the American food landscape, particularly during the COVID-19 pandemic and likely beyond, ensuring that restaurants provide nutrition labeling on TPP menus, as the FDCA requires, will provide important public health benefits.

Thus, we strongly urge the FDA to issue interpretative guidance or take other steps to clarify that the FDCA requires Covered Establishments and TPPs to provide nutrition information on TPP menus.

We appreciate your thoughtful consideration of these issues.

Sincerely,

Center for Science in the Public Interest
American Heart Association
American Public Health Association
Center for Digital Democracy
Consumer Federation of America
Consumer Reports

[1] The Center for Science in the Public Interest ("CSPI") is a non-profit consumer education and advocacy organization that has worked since 1971 to improve the public's health through better nutrition and safer food. The organization does not accept government or corporate grants and is supported by the roughly half million subscribers to its Nutrition Action Healthletter. CSPI provides nutrition and food safety information directly to consumers, and has long advocated for legislation, regulation, and judicial rulings to ensure that foods are safe and clearly labeled.

[2] The American Heart Association ("AHA") is the nation's oldest and largest voluntary organization dedicated to fighting heart disease and stroke. Founded in 1924, AHA now includes more than 40 million volunteers and supporters, with local chapters in all 50 states, as well as in Washington D.C. and Puerto Rico. The association invests in research, professional and public education, and advocacy so people across America can live longer, healthier lives.

[3] The American Public Health Association champions the health of all people and all communities, strengthens the profession of public health, shares the latest research and information, promotes best practices, and advocates for public health policies grounded in research. APHA represents over 23,000 individual members and is the only organization that combines a nearly 150-year perspective and a broad-based member community with an interest in improving the public's health. APHA supports efforts to ensure consumers have access to accurate nutritional information to help them make informed and healthier choices about their diets.

[4] The Center for Digital Democracy's mission is to ensure that digital technologies serve and strengthen democratic values, institutions and processes. CDD strives to safeguard privacy and civil and human rights, as well as to advance equity, fairness, and community.

[5] The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, more than 250 of these groups participate in the federation and govern it through their representatives on the organization's Board of Directors. CFA works to support food policies that promote transparency, empower consumers to make healthy choices, and ensure access to a safe and wholesome food supply.

[6] Consumer Reports is a nonprofit organization that works for and with consumers for truth, transparency, and fairness in the marketplace. We use our independent and rigorous research, consumer insights, journalism, and policy expertise to inform people's purchase decisions, improve the products and services businesses deliver, and drive regulatory and fair competitive practices. Our work helps create a safer, fairer and more transparent marketplace.

[7] Zion A, Hollmann T. *Food delivery apps: usage and demographics- winners, losers and laggards.* Zion & Zion. 2019. https://www.zionandzion.com/research/food-delivery-apps-usage-and-demographics-winners-losers-and-laggards/

[8] The Federal Food, Drug, and Cosmetic Act ("FDCA") defines a "Covered Establishment" as a "restaurant or similar retail food establishment that is part of a chain with 20 or more locations doing business under the same name (regardless of the type of ownership of the locations) and offering for sale substantially the same menu items." *See* 21 U.S.C. § 343(q)(5)(H)(i).

[9] *See Menu Labeling Requirements*, U.S. Food and Drug Administration ("FDA") (April 1, 2020), https://www.fda.gov/food/food-labeling-nutrition/menu-labeling-requirements; *see also* 21 U.S.C. § 343(q)(5)(H)(ii) (setting forth the nutrition labeling requirements).

[10] 21 C.F.R. § 101.11(a).

[11] 79 Fed. Reg. 71156, 71177–88 (2014).

[12] 76 Fed. Reg. 19192, 19222 (2011).

[13] Crockett RA, et al. Nutritional Labelling for Healthier Food or Non-Alcoholic Drink Purchasing and Consumption. *Cochrane Database of Systematic Reviews.* 2018;2(2):CD009315.

[14] Ford ES & Dietz WH. Trends in energy intake among adults in the United States: findings from NHANES. *Am J Clin Nutr.* 2013;97(4):848-853.

[15] Crockett RA, et al. Nutritional Labelling for Healthier Food or Non-Alcoholic Drink Purchasing and Consumption. *Cochrane Database of Systematic Reviews.* 2018;2(2):CD009315.

[16] Petimar J, et al. Estimating the effect of calorie menu labeling on calories purchased in a large restaurant franchise in the southern United States: quasi-experimental study. *BMJ.* 2019;367: l5837.

[17] Wang, et al. Reaching the healthy people goals for reducing childhood obesity: closing the energy gap. *Am J Prev Med.* 2012;42(5):437-444.

[18] Hall K, et al. Quantification of the Effect of Energy Imbalance on Bodyweight. *Lancet*. 2011;378(9793): doi:10.1016/S0140-6736(11)60812-X.
[19] Zion A, Hollmann T. *Food delivery apps: usage and demographics- winners, losers and laggards.* Zion & Zion. 2019. https://www.zionandzion.com/research/food-delivery-apps-usage-and-demographics-winners-losers-and-laggards/
[20] Portalatin D. *Food and Beverage Behavior During COVID-19 Outbreak*. The NPD Group. https://www.npd.com/wps/portal/npd/us/blog/2020/food-and-beverage-behavior-during-covid-19-outbreak/.
[21] The Chipotle burrito nutrition calculator can be found here: https://www.chipotle.com/nutrition-calculator.
[22] DoorDash's Chipotle menu can be found here: https://bit.ly/32DH6pS.
[23] Seamless's Chipotle menu can be found here: https://bit.ly/3eUSYJ1.
[24] 21 C.F.R. § 101.11(a) (emphasis added).
[25] *Id.*; *see also* 79 Fed. Reg. at 71179 ("The definition of 'menu or menu board' clearly specifies that menus may be in different forms and does not establish a standard for the technology used on a menu or menu board. The definition lists a number of examples . . ., including electronic menus and menus on the Internet, that are not meant to be all inclusive . . . .").
[26] 79 Fed. Reg. at 71179.
[27] *See* 79 Fed. Reg. at 71179.
[28] The FDA has made clear that the "primary writing" does not mean that there is only one menu that is required to be labeled. Instead, any menu that a customer primary utilizes to place an order is considered a primary writing. *See* 76 Fed. Reg. at 19202 ("If covered establishments were only required to label the writing they consider to be their primary writing . . . , only one writing would be required to be labeled. [The] FDA [interprets] 'primary writing' . . . from a consumer's vantage point. For example, while a printed menu may be the 'primary writing' of a restaurant used by a customer ordering food while dining inside . . . , a menu mailed as a flyer . . . could be the 'primary writing' of the restaurant used by that customer ordering take-out . . . . Both the printed menu and the menu flyer would meet the definition of 'menu' . . . .").
[29] 21 C.F.R. § 101.11(a).
[30] 21 U.S.C. § 343(q)(5)(H).
[31] 21 U.S.C. § 331 (a), (c), (k). "Interstate commerce" is broadly interpreted under the FDCA, and includes commerce within the District of Columbia, 21 U.S.C. § 321(b), as well as "products made from interstate components regardless of the amount present, even though the finished product has not moved in interstate commerce," FDA, CPG Sec 100.200 FDA Jurisdiction Over Products Composed of Interstate Ingredients (Aug. 1989), https://bit.ly/39ttEau.
[32] *See United States v. Carlson*, 810 F.3d 544, 555 (8th Cir. 2016).
[33] U.S. Food and Drug Administration. *Key Legal Concepts for Cosmetics Industry: Interstate Commerce, Adulterated, and Misbranded*. 2020. https://www.fda.gov/cosmetics/cosmetics-laws-regulations/key-legal-concepts-cosmetics-industry-interstate-commerce-adulterated-and-misbranded.