THE KROGER CO. • CORPORATE AFFAIRS • 1014 VINE STREET • CINCINNATI, OHIO 45202

July 5, 2011

The Honorable Margaret A. Hamburg, M.D.
Commissioner of Food and Drugs
U.S. Food and Drug Administration
White Oak Building 1
10903 New Hampshire Avenue
Room 2217
Silver Spring, MD 20993

RE: Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Proposed Rule

Docket No. FDA-2011-F-0172

Dear Commissioner Hamburg:

The Kroger Co. appreciates the opportunity to respond to the FDA's request for comments on the proposed rule implementing § 4205 of the Affordable Care Act, commonly referred to herein as the proposed restaurant menu labeling rule.

The Kroger Co. is the nation's largest traditional grocer. Kroger operates more than 2,400 grocery stores in 31 states. In addition to operating under the banner Kroger, our customers in some states are familiar with our banners Dillons, Fred Meyer, Ralphs, QFC, Smith's, Fry's, King Soopers, City Market, and Food 4 Less. We also operate 40 manufacturing plants that produce about 40% of the corporate brands sold in our stores. Today, we are proud to employ more than 338,000 associates across the United States.

Kroger is also a member of the Food Marketing Institute (FMI). The FMI has prepared detailed comments on behalf of the industry, and we would like to associate The Kroger Co. with the comments prepared by our trade association. We believe FMI's comments provide valuable arguments as to why the proposed restaurant menu labeling rule should not apply to grocery stores.

The Kroger Co. believes that the Agency should adopt "Option 2" as is set forth in the regulatory impact analysis. "Option 2" would limit the scope of the rule to only restaurants and similar establishments, as it was intended by Congress, and prevent the creation of a new rule that will cost Kroger—and ultimately our customers—more than $20 million each year.

In these comments, we would like to focus on three aspects of why this rule is virtually impossible to comply with in the supermarket industry. First, the cost is prohibitive. Second, the rule will drastically curtail an entrepreneurial culture that exists in the delis and bakeries in our stores and require us to limit product options for our customers. Finally, the rule puts traditional grocery stores at a disadvantage to what has become a large competitor—big box superstores.

"Option 1" of the Proposed Restaurant Menu Labeling Rule is Cost Prohibitive.

After reading the proposed restaurant menu labeling rule, The Kroger Co. assembled a team of experts to determine the cost impact to our Company. The results were staggering.

First, it is notable to remind the Agency that the margins in the grocery industry are among the slimmest of any industry today. In fact, in the four decades since FMI began conducting research, the industry margin has never risen above 2%. We are the perfect example of a high-volume, low-margin industry, and the result is that operational cost increases, such as those required by new regulations, are passed directly on to customers in the form of higher prices.

In nearly all of our stores, we have departments that provide some prepared foods, deli items, sandwiches, pizzas, olive bars, salad bars, bakery cakes/cookies/donuts, desserts, sushi, bagels, breads, and hot soups. These items appear to be covered by the proposed restaurant menu labeling rule. It is difficult to imagine an olive or salad bar cluttered with a multitude of signs and labels. It is also difficult to imagine a birthday cake counter with the numerous signs required because of the potential for customized cakes. In addition, whole rotisserie chickens and whole cakes would have to be labeled with total calories and not be based on the serving size as required by the Nutrition Labeling and Education Act. The result is a frustrating and confusing experience for customers and an expensive proposition for grocery retailers.

Kroger will be required to have thousands of items undergo expensive laboratory tests to determine nutritional content of store prepared foods as required by the restaurant menu labeling rule. We believe our initial set-up cost for this rule will be approximately $2.5 million, and will require an annual ongoing cost of $450,000 for new and altered items.

The supplies required to implement this rule are also expensive. This category includes labels, food safety programs resulting from new signage in stores, auditing, and menu boards. We estimate spending more than $15 million to set the program up initially, and we expect an ongoing annual cost of more than $4 million.

Finally, we expect a significant cost for implementation of the program. We expect a nearly $20 million annual expense increase related to the time required to implement this program. This includes the time required to set each tag, maintain and clean the tags, and administer the program from our corporate headquarters. Unfortunately, this massive expense will delay job creation in other areas of our company, including those jobs created by building and operating new stores that will serve our customers.

Our total expense estimate for implementation of the restaurant menu labeling program is a one-time set-up cost of $21,600,000 and an ongoing annual cost of $24,194,775. As the Agency can see, this is an enormous regulatory burden for The Kroger Co. and it will hamper our ability to grow our business in a sustainable manner through building new stores, investing in new manufacturing facilities, and attracting new customers.

In Executive Order 13563, President Obama firmly stated that new regulations "must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends." For traditional grocery stores, "Option 1" as outlined in the proposed restaurant menu labeling program is burdensome and expensive and will have the net result of stifling growth without achieving the regulatory end desired by Congress.

"Option 1" of the Restaurant Menu Labeling Rule Will Limit Customer Choice and Eliminate Entrepreneurship within Stores.

While Kroger is admittedly a large company, in some ways each of our stores is still run like a small business. There is no better example than in the deli/bakery departments. We pride ourselves on preparing regional and seasonal dishes, and we allow our chefs great leeway in choosing what to set in a prepared or semi-prepared foods case. This allows us to serve our customers locally and provide them with a variety of foods that change based on their desires for regional and seasonal choices.

For instance, Chef Dee Burkhardt in our Anderson Township, Ohio, store makes a delicious chicken pot pie. It's a favorite of many of her customers, and it's on the menu more than 60 days per year. It's also her personal recipe, and it is only available in a handful of stores near Anderson Township. Chef Sean Schmidt in Kettering, Ohio, created a fantastic chicken salad and meat loaf, only available in the Fresh Fare store in Kettering. His customers love these products. Chef Dee and Chef Sean are two of our many entrepreneurial chefs. They choose to work for us because we offer them the flexibility of cooking in an environment that is markedly different from a chain restaurant.

In addition, unlike restaurants, our Chefs often shop in our stores to find ingredients for their prepared foods. In many cases, they will use different ingredients based on what is seasonal or in stock. It is not unusual for ingredients to change regularly. The restaurant menu labeling rule would render that nearly impossible.

Under "Option 1" of the proposed restaurant menu labeling rule, Chef Dee's chicken pot pie and Chef Sean's meat loaf and chicken salad will likely be eliminated from the offerings sold in our stores. They will require expensive nutritional content analysis, regular testing and auditing, and labels, tags, and record-keeping. At the cost described in the above section, it will likely be simpler and more cost-effective to prepare one version of the chicken salad at a separate location, and ship it to the stores. As we explained above, "Option 1" will limit choice and entrepreneurship in our stores. Indeed, this rule could end up meaning that Kroger and other similar companies would be forced to reduce the number of in-store chefs we hire.

"Option 1" of the Restaurant Menu Labeling Rule Will Place Traditional Grocers at a Disadvantage in the Food Retailing Market.

Today, many Americans choose to buy their groceries at locations that may not resemble grocery stores of the past. The advent of supercenters has created a new style of food retailing, and Kroger now competes with large, big-box retailers that also sell televisions, tires, fishing equipment and apparel. Kroger has been fortunate to continue to succeed and find new ways to compete with what are now our largest competitors by providing new services, maintaining low prices, and providing a fantastic shopping experience. However, we are concerned that "Option 1" of the restaurant menu labeling rule would hamper our ability to compete because it will add a multi-million dollar mandate to our business that is not required of these big-box retailers. In addition, the FDA has excluded smaller, independent grocers, also competitors, from this regulation.

As an example, Kroger operates Dillons grocery stores in Kansas. In the town of Liberal, Kansas, approximate population 20,000, Dillons competes with a big box retailer and an independent grocer. The main drag in Liberal, Kansas is called Kansas Avenue, and just off the northern part of the avenue is an approximately 125,000 square foot big-box retailer that sells food in approximately 45,000 square feet of the store. Less than a mile down Kansas Avenue is a 53,000 square foot Dillons store that we have operated since 1991. And just another half-mile down Kansas Avenue is a 30,000 square foot independent grocer. Under "Option 1" it would appear that only the Dillons store is covered by the proposed restaurant menu labeling rule. The Dillons store, in the middle of Liberal, Kansas, finds itself squeezed by two competitors that will be able to avoid an expensive regulation.

The cost of tagging and maintaining a robust menu labeling program as outlined in the proposed rule will significantly increase the cost of operating the Dillons store, but will do nothing to increase the cost of operating the big-box retailer or the independent retailer. This creates an unfair playing field for traditional grocery retailers. This is just one example of how this regulation places economic and competitive disadvantages on only one type of grocery store.

To be clear, we are not advocating that "Option 1" be expanded to cover big-box or independent food retailers. Indeed, we believe strongly that "Option 2" is the more appropriate way to promulgate the restaurant menu labeling rule as intended by the Congress.

Conclusion

The Food Marketing Institute has submitted comprehensive comments that detail the numerous reasons that the Agency should select "Option 2" when it issues its final rule on the restaurant menu labeling program. We appreciate the opportunity to add a few comments specific to The Kroger Co. operations. To recap:

- The cost of "Option 1" is prohibitive: This rule, as proposed, will cost Kroger more than $20 million to initiate, and more than $24 million to maintain each year. In a low-margin business, that type of regulatory burden is difficult to absorb without passing on the cost in the form of higher prices to customers.

- The rules in "Option 1" will limit choice and eliminate entrepreneurship in our stores: The Congress clearly intended that this rule apply to restaurants. Grocery stores that currently allow individual employees to creatively manage a prepared food case with a variety of fresh, seasonal and unique items will likely be forced to significantly limit the offerings in the cases to comply with expensive new labeling requirements.
- The definition in "Option 1" excludes grocery retailers that are our competition, namely big-box retail grocery stores as well as independent grocers: Should the proposed rule be implemented using "Option 1," traditional grocery stores will be at a significant disadvantage, forced to comply with an expensive and cumbersome regulation.

Kroger shares the Agency's and Congress's goal of improving nutritional information to customers. That's why we are proud to note that, in our industry, more than 95% of the food items in a typical grocery store contain complete nutritional information. We are constantly looking for ways to improve, but we strongly believe that a prescriptive new regulation designed for restaurants will only reduce our ability to implement other, more effective programs. Other jurisdictions, such as New York City, have implemented menu labeling laws; however, not one law or regulation has yet applied to grocery stores.

By including traditional grocery stores in the proposed rule's "Option 1," the end result amounts to fitting a square peg in a round hole. To develop a rule that includes both grocery stores and restaurants in one prescription is unwise and will result in costly inefficiencies that could slow our growth, hinder job creation, and create inequalities in the marketplace.

Finally, it is worth noting that The Kroger Co. is not opposed to nutritional labeling. We are committed to working with the Agency to develop a program that better suits grocery stores and our unique operational circumstances. However, we respectfully request that absent a program that suits the grocery industry in a way that does not increase cost significantly, the Agency should choose "Option 2" in its final rule concerning restaurant menu labeling.

Sincerely,

Margaret McClure

Margaret McClure
Vice President, Deli-Bakery
The Kroger Co.

Brendon Cull

Brendon Cull
Director of Government Relations
and Regulatory Affairs
The Kroger Co.
513-762-1316
brendon.cull@kroger.com