FDA to Hear Comments on Calorie Labeling

Current State and Local Rulings Could be Impacted

BY KEVEN DANOW

Posting Calories On Menus

The Food and Drug Administration has requested comments on proposed regulations relating to calorie labeling on menus and menu boards in chain restaurants, retail food establishments with 20 or more locations. The proposed rule would apply to an establishment that either (1) presents itself as a restaurant or (2) uses more than 50% of its total floor area for the sale of food. Such establishments will be required to disclose the calories on all menus and menu boards. The FDA has tentatively concluded that bars and restaurants don't have to post calorie labels on beer, wine or other alcoholic beverages.

Under the proposed rules, state and local governments would not be able to impose any different or additional nutrition labeling requirements for food sold in restaurants and similar retail food establishments covered by the federal requirements. State and local governments would be permitted to establish nutrition labeling requirements for establishments not covered by the new law or regulations.

Currently, New York City Health Code Section 81.50 requires covered food service establishments that hold New York City Health Department permits to post calorie information prominently on menu boards and menus. The City's statute applies to establishments which belong to a group of 15 or more food service establishments that operate under common ownership or are individually franchised, whether locally or nationally, or do business under the same name and offer substantially the same menu items, in servings that are standardized for portion size and content. Section 81.50 does apply to beer, wine and other alcoholic beverages.

The FDA hopes to have the federal rules in place sometime next year. When they do, and if the FDA continues with its current plan to preempt state and local, the New York City rules would be limited to groups of more than 15 but less than 20 locations.

Beer Franchise Law

On January 28th, Hon. Nicholas G. Garaufis, U.S. District judge for the Eastern District of New York, rendered an opinion in *Amtec International of NY Corp. v Beverage Alliance LLC*, interpreting section 55-c of New York's Alcoholic Beverage Control Law, which governs agreements between brewers and beer wholesalers.

Section 55-c effectively creates a franchise agreement between the brewer and the wholesaler which is unique to New York's beer industry. There are no similar provisions governing wine or spirits in New York.

The statute covers "any contract, agreement, arrangement, course of dealing or commercial relationship between a brewer and a beer wholesaler pursuant to which a beer wholesaler is granted the right to purchase, offer for sale, resell, warehouse or physically deliver beer sold by a brewer," and creates a cause of action for damages and equitable relief against a brewer who cancels the agreement, fails to renew, or terminate it without good cause as defined by the statute, notice to the wholesaler with an opportunity to cure. The statute does not apply to agreements which have all terms of significance set forth in writing that were in effect prior to June 15th, 2001. There are also exceptions for such things as fraud, bankruptcy and felony convictions.

In his opinion Judge Garaufis found the definition of agreement "clearly covers non-written agreements, despite 55-c(3)'s requirement that "beer offered for sale in this state by a brewer to a beer wholesaler shall be sold and delivered pursuant to a written agreement.'"

Moreover, Judge Garaufis ruled that for the purposes of the statute, the term "brewer" includes "any person or entity engaged primarily in business as a brewer, importer, marketer, broker or agent of any [brewer] who sells or offers to sell beer to a beer wholesaler in this state or any successor to a brewer." Under Judge Garaufis' interpretation of the statute, the wholesaler is protected against any termination or change to its distribution rights, even if it did not have a direct relationship with the actual brewer, but rather obtained its rights under a contract or course of dealing with an importer, broker or agent. If the brewer changes the importer, the new importer would be a "successor" and the wholesaler would continue to hold a "franchise right" under the statute. The decision could have far reaching implications. It raises the question of whether a primary New York beer wholesaler is a "brewer" for the purpose of the franchise statute because it acts as an "importer, marketer, broker or agent" of the manufacturer.

Keven Danow is an attorney representing members of all three tiers of the beverage alcohol industry and member of the firm of Danow, McMullan & Panoff, P.C. 275 Madison Ave, NY, NY 10022. t/ 212-370-3744, e/ kdanow@dmppc.com.`