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Introduced by M. of A. MORELLE, HOYT, PAULIN, CASTRO, GOTTFRIED, LANCMAN, COLTON, MILLMAN, ENGLEBRIGHT, DINOWITZ, JAFFEE, DenDEKKER -- Multi-Sponsored by -- M. of A. COOK, MAGNARELLI, MENG -- read once and referred to the Committee on Consumer Affairs and Protection -- recommitted to the Committee on Consumer Affairs and Protection in accordance with Assembly Rule 3, sec. 2 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT in relation to creating the menu nutritional disclosure act of 2010

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. This act shall be known and may be cited as the "menu nutritional disclosure act of 2010".

S 2. 1. For purposes of this act, the following definitions shall apply:

(a) "Food facility" means a food facility in the state that operates under common ownership or control with at least 9 other food facilities with the same name in the state that offer for sale substantially the same menu items, or operates as a franchised outlet of a parent company with at least 9 other franchised outlets with the same name in the state that offer for sale substantially the same menu items, except that a "food facility" does not include the following:

(i) Certified farmer's markets.

(ii) Commissaries.

(iii) Licensed health care facilities.

(iv) Mobile support units.

(v) Restricted food service facilities.

(vi) Retail stores in which a majority of sales are from a pharmacy.

(vii) Vending machines.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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(b) "Calorie content information" means the total number of calories per standard menu item, as that item is usually prepared and offered for sale.

(c) "Drive-through" means an area where a customer may provide an order for and receive standard menu items while occupying a motor vehicle.

(d) "Menu board" means a posted list or pictorial display of food or beverage items offered for sale by a food facility. "Menu board" does not include printed or pictorial materials for the purpose of marketing.

(e) "Menu" means a printed list or pictorial display of food or beverage items offered for sale by a food facility. "Menu" shall not include printed or pictorial materials for the purpose of marketing.

(f) "Food item tag" means a label or placard that identifies any food item displayed for sale at a food facility. "Food item tag" shall not include printed or pictorial materials for the purpose of marketing.

(g) "Nutritional information" includes, but is not limited to, all of the following, per standard menu item, as that item is usually prepared and offered for sale:

(i) Total number of calories.

(ii) Total number of grams of carbohydrates.

(iii) Total number of grams of saturated fat.

(iv) Total number of milligrams of sodium.

(h) "Point of sale" means the location where a customer makes an order.

(i) "Standard menu item" means a food or beverage item offered for sale by a food facility through a menu, menu board, or food item tag at least 180 days per calendar year, except that "standard menu item" does not include any of the following:

(i) A food item that is customized on a case-by-case basis in response to an unsolicited customer request.

(ii) An alcoholic beverage, the labeling of which is not regulated by the federal food and drug administration.

(iii) A packaged food otherwise subject to the nutrition labeling requirements of the federal Nutrition Labeling and Education Act of 1990.

(iv) A food item when served at a consumer self-service salad bar.

(v) A food or beverage item when served at a consumer self-service buffet.

(vi) Condiments.

(vii) Other items placed on counters or tables for use without charge to consumers.

(j) "Reasonable basis" means any reasonable means recognized by the federal food and drug administration of determining nutritional information, as well as calorie content information, for a standard menu item, as usually prepared and offered for sale, including, but not limited to, nutrient databases and laboratory analyses.

(k) "Appetizer" means a food item that is generally served prior to a food item that is generally regarded as the primary food item in a meal. An "appetizer" includes a first course, starter, or small plate.

(l) "Dessert" means a food item that is generally served after a food item that is generally regarded as the primary food item in a meal. "Dessert" includes, but is not limited to, cakes, pastries, pies, ice cream and food items that contain ice cream, confections, and other sweets.

2. (a) Commencing July 1, 2011 and remaining in effect until December 31, 2012, inclusive, every food facility shall disclose nutritional

information as required by paragraph (b) of this subdivision or comply with the requirements of subdivision 3 of this section during this time.

(b) (i) In order to comply with paragraph (a) of this subdivision, a food facility that does not provide sit-down service shall disclose the information in a clear and conspicuous manner on a brochure that is made available at the point of sale prior to or during the placement of an order. A food facility that provides sit-down service shall provide the nutritional information in a clear and conspicuous size and typeface on at least one of the following:

(1) A brochure available on the table.

(2) A menu next to each standard menu item.

(3) A menu, under an index section that is separate from the listing of standard menu items.

(4) A menu insert.

(5) A table tent on the table.

(ii) Notwithstanding subparagraph (i) of this paragraph, a food facility that has a drive-through area and uses a menu board to display or list standard menu items at the point of sale shall, for purposes of the drive-through area only, disclose the nutritional information in a clear and conspicuous manner on a brochure or other printed material that is available upon request, and shall conspicuously display a notice at the point of sale that reads: "NUTRITIONAL INFORMATION IS AVAILABLE UPON REQUEST" or other similar statement that indicates the disclosure of nutritional information is available upon request.

3. (a) On and after January 1, 2013, every food facility that provides a menu shall disclose calorie content information for a standard menu item next to the item on the menu in a size and typeface that is clear and conspicuous.

(b) On and after January 1, 2013, every food facility that uses an indoor menu board shall disclose calorie content information for a standard menu item next to the item on the menu board in a size and typeface that is clear and conspicuous.

(c) On and after January 1, 2013, every food facility that uses a food item tag as an alternative to a menu or menu board to describe a standard menu item that is displayed for sale in a display case within the food facility shall disclose calorie content information for that standard menu item on the food item tag for that item in a size and typeface that is clear and conspicuous.

(d) On and after January 1, 2013, every food facility that has a drive-through area and uses a menu board to display or list standard menu items at the point of sale shall, for purposes of the drive-through area only, disclose the nutritional information for each standard menu item in a clear and conspicuous manner on a brochure or other printed material that is available upon request, and shall clearly and conspicuously display a notice at the point of sale that reads: "NUTRITIONAL INFORMATION IS AVAILABLE UPON REQUEST" or other similar statement that indicates the disclosure of nutritional information is available upon request. If a food facility subject to this paragraph discloses nutritional information in the manner described in paragraph (b) of this subdivision, the food facility shall be deemed to be in compliance with this paragraph.

4. For purposes of subdivision 3 of this section, the disclosure of calorie content information on a menu or menu board next to a standard menu item that is a combination of at least two standard menu items on the menu or menu board, shall, based upon all possible combinations for that standard menu item, include both the minimum amount of calories for

the calorie count information and the maximum amount of calories for the calorie count information. If there is only one possible total amount of calories, then this total shall be disclosed.

5. For purposes of subdivision 3 of this section, the disclosure of calorie content information on a menu or menu board next to a standard menu item that is not an appetizer or dessert, but is intended to serve more than one individual, shall include both of the following:

(a) The number of individuals intended to be served by the standard menu item.

(b) The calorie content information per individual serving. If the standard menu item is a combination of at least two standard menu items, this disclosure shall, based upon all possible combinations for that standard menu item, include both the minimum amount of calories for the calorie count information and the maximum amount of calories. If there is only one possible total amount of calories, then this total shall be disclosed.

6. For beverage items, a range of calorie count information may be provided, which includes both the minimum amount of calories for any beverage item and the maximum amount of calories.

7. The nutritional information and calorie content information required by this act shall be determined on a reasonable basis. A reasonable basis determination of nutritional information and calorie content information shall be required only once per standard menu item, provided that portion size is reasonably consistent and the food facility follows a standardized recipe and trains to a consistent method of preparation.

8. Menus and menu boards may include a disclaimer that indicates that there may be variations in nutritional content across servings, based on variations in overall size and quantities of ingredients, and based on special ordering.

9. This act shall not be construed to create or enhance any claim, right of action, or civil liability that did not previously exist under state law or limit any claim, right of action, or civil liability that otherwise exists under state law. No private right of action shall arise out of this act. The only enforcement mechanism of this act shall be the local enforcement agency.

10. This act shall not be construed to preclude any food facility from voluntarily providing nutritional information in addition to the requirements of this act.

11. To the extent consistent with federal law, this act, as well as any other state law that regulates the disclosure of nutritional information, is a matter of statewide concern and occupies the whole field of regulation regarding the disclosure of nutritional information by a food facility as well as content required to be posted on menus, menu boards and food item tags. No ordinance or regulation of a local government shall regulate the dissemination of nutritional information or the content required to be placed on menus, menu boards or food item tags by a food facility. Any ordinance or regulation that violates this prohibition is void and shall have no force or effect.

12. Commencing July 1, 2011, a food facility that violates this act is guilty of an infraction, punishable by a fine of not less than fifty dollars or more than five hundred dollars, which may be assessed by a local enforcement agency. However, a food facility may not be found to violate this act more than once during an inspection visit. Notwithstanding the penal law or any other provision of law to the contrary, a violation of this act shall not constitute a misdemeanor.

13. Within 180 days after the effective date of this act, the New York state department of health shall promulgate regulations defining the specific requirements that constitute substantial compliance with this act by food facilities.

14. If any provision of this act or the application thereof is for any reason held invalid, ineffective, or unconstitutional by a court of competent jurisdiction, the remainder of this act shall not be affected thereby, and to this end, the provisions of this act are severable.

S 3. This act shall take effect immediately.