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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

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**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 more than 13,000 associates. KVAT is committed to our customers, to our associates and to being a community-oriented organization. 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 *Let's Move's* 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, as well as the overarching supermarket industry who operates nearly 40,000 stores and employs more than 3.5 million people in retail operations 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 to focus on the need for enactment of the *Common Sense Nutrition Disclosure Act of 2015* (H.R. 2017).

The key to this effort from my perspective is the **common sense** part of this legislation. Grocery stores are going to deliver what customers want and in the format they want to receive it. For the government to spend hundreds of pages of *Federal Register* text to prescribe as part of a menu labeling law a type size and a "succinct statement" that must accompany the calorie information and the written offer of additional nutrition information available upon request, all adjacent or directly affixed to an item that is not on a menu or menu board 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 not only includes calorie information, but also the full Nutrition Facts panel which lists fat, sodium, carbohydrates and much more nutrition information. 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. I don't believe these are 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 regulations regarding the Food Safety and Modernization Act (FSMA), compliance with requirements for Country of Origin Labeling, Ingredient Labeling and 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 and to which we should and do devote much attention and significant resources. They are also regulations with which chain restaurants are not required to comply. 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 are required to abide by, it shouldn't surprise anyone that "the glove doesn't fit."

SUPERMARKET INDUSTRY POSITION AND ENAGEMENT ON CHAIN RESTAURANT MENU LABELING

Companies engaged in the supermarket industry constantly compete 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's effectively mandating the standardization of foods that removes the creativity, passion and regional flavors our customers expect from us and love.

Food City's Healthy Initiatives department has already been actively addressing nutrition and 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 make purchases that near the \$6,000,000 level which provide local, healthy products to our customers.

We use the NuVal nutrition scoring and shelf-tag system, so customers can make quick and easy nutritional comparisons among 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 in addition to the approximately 95% of foods sold throughout our stores that already are 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, more than 36,000 food items that vary and alter the content of salads made by customers at salad bars or other freshly made items for the customer’s choosing.

FDA’s final rule, published on December 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 view our company as a collection of stores with qualities that make each of them unique. We encourage our chefs and our bakery and deli departments to offer items that reflect the creativity, entrepreneurship, and local foods appreciated by the customers who shop in each of those stores. There are items that we may only sell at one or two stores, and while the same name may be listed in various stores, the ingredients or recipe may vary among our stores. 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, these will appear more frequently along the salad bar. Under the regulations, grocery stores not only will need to produce and update signage, we will need to perform nutritional analyses to ensure these profiles are documented, maintained and available upon request. These are all things that eliminate 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 placing a sign, book or electronic kiosk above or at the end of the salad bar to list calorie counts for all items instead of putting a label on every ladle and tray, which are constantly moving and getting switched out. Based on the information FMI has received from FDA, this would not be considered compliant under FDA’s rules. We have also considered using scale-labels from our deli area for grab-and-go items, such as sandwiches made from the deli early in the day, but with an FDA-mandated font size, the font-size would not be compliant without having to completely replace all 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 to have the opportunity 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 analyses 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’s requiring 150-200 individual items, on average, per store across 30,000 stores to undergo nutrition analysis, ranging from \$500-\$1,500 per item, 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 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% and based on FMI data collected for the past 40 years, this 1% margin has not changed in all those years. There is very little room for us to absorb significant costs such as the ones presented by a new menu labeling requirement. When a company operates on a razor-thin margin, it simply doesn'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 pay more and get practically nothing in return when they grocery shop.

We have raised these concerns, as well as many additional technical questions with FDA, through our trade associations, and FMI has even conducted store tours with a team of FDA officials as well as have 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 the steps necessary 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 by addressing such needs 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.