CARLTON FIELDS

Game Changers: New Laws Affecting Franchise Systems in 2011

May 15, 2011

INTRODUCTION From gift card reform to healthcare reform, a number of significant developments have recently taken place in terms of federal legislation. Although many of these new federal laws are not aimed at the franchise industry, they will, nevertheless, affect how franchisors and franchisees do business moving forward. This article identifies some of the major changes in the law, and briefly examines how these new rules and regulations may impact franchise systems. Specifically, Part I details the recent rule changes concerning the issuance of gift cards and gift certificates and how those changes may affect various State gift card laws. Part II discusses the new regulations governing debit card interchange fees and payment card networks. Part III examines the new federal food safety laws and the creation of an integrated national food system. Part IV provides an overview of the healthcare reform law and the provisions effective for employers in 2011. Finally, Part V discusses the new nutrition menu-labeling requirements instituted through the healthcare reform law. **I. Gift Cards/Certificates Reform A. Overview** In 1978, Congress passed the Electronic Fund Transfers Act, 15 U.S.C. § 1693 *et seq.* (the "EFT Act") to provide a basic framework for establishing the rights, liabilities, and obligations of any persons engaged in electronic fund and remittance transfers.[1] The act was specifically designed to protect consumers from misleading and unfair billing and credit card practices, by requiring companies to provide full and complete disclosures of the terms and conditions of electronic fund transfers involving the consumer's account at or before the time the consumer contracts for such service.[2] Prior to 2009, the EFT Act did not have much, if any, impact on franchise systems because it was primarily directed at banks and credit card companies. That, however, changed with the passage of the Credit Card Accountability Responsibility and Disclosure Act of 2009 (the "Credit CARD Act"), which amended, enacted, and re-designated certain provisions of the EFT Act. In particular, the Credit CARD Act enacted section 1693*l*-1, which regulates and seeks to curb certain unfair practices involving the issuance of pre-paid cards, store gift cards, and gift certificates.[3] **B. The Scope of 15 U.S.C. § 1693*l*-1** *Section* 1693*l*-1 generally prohibits any entity from imposing dormancy (i.e., non-use), inactivity, or service charges or fees on store gift cards, gift certificates, or general use pre-paid

cards.[4] The terms 'store gift cards,' 'gift certificates,' and 'general-use pre-paid cards' are defined in section 1693*l*-1 as any electronic promise, plastic card, or other payment code or device issued in a specific amount, purchased on a prepaid basis, and redeemable at a single merchant or affiliated group.[5] Expressly excluded, however, are electronic promises, plastic cards, or other payment codes or devices that are:

- not marketed to the general public;
- issued in paper form;
- used solely for telephone services;
- reloadable and not marketed as gift cards or certificates;
- loyalty, award, or promotional cards; or,
- redeemable only for admission to events or venues.

There are two exceptions to the general prohibition on post-purchase fees or charges. First, businesses may charge dormancy, inactivity, or service charges or fees where: (i) there has been no activity with respect to the card or certificate in the 12-month period ending on the date the charge or fee is imposed, (ii) the card or certificate clearly states that such fee or charge may be charged, the amount of such fees, how often the fee or charge may be assessed, and that such fee or charge may be assessed for inactivity, and (iii) no more than one fee is charged in any given month.[6] Second, the general prohibition will not apply to gift certificates that are distributed pursuant to an award, loyalty, or promotional program, and for which no money or other value was exchanged.[7] Section 1693*l*-1 also generally prohibits the sale of gift cards, gift certificates, or general-use pre-paid cards with expiration dates.[8] Again, there is a limited exception to this rule. Entities may sell cards or certificates with expiration dates provided the expiration dates are not earlier than five (5) years after the date of issuance (or when funds were last loaded on the card), and the terms of expiration are clearly and conspicuously stated.[9] **C. Reconciling State Gift Card Laws with § 1693*l*-1** Prior to the Credit CARD Act, nearly every State had passed some form of consumer protection legislation governing the issuance of pre-paid cards, store gift cards, and/or gift certificates since there was no federal legislation in place.[10] As a result, the rules governing gift cards varied, sometimes significantly, from State to State.[11] Section 1693*l*-1 was, therefore, enacted to establish a uniform set of guidelines. Section 1693*l*-1 preempts State gift card laws that are inconsistent with the EFT Act's provisions, but only to the extent of their inconsistency.[12] State gift card laws that afford consumers greater protection than the protection afforded by the Act are not deemed inconsistent because they satisfy the primary purpose of the Act of protecting consumers.[13] Thus each applicable State's gift card law must be analyzed against section 1693*l*-1 to determine what portions of the law, if any, would be preempted by the new federal guidelines. For example, California's gift card law prohibits the sale of gift certificates[14] with expiration dates unless the expiration date appears on the front of the certificates in capital letters in at least 10-point font and

the certificates are: (i) issued pursuant to an awards, loyalty, or promotional program; (ii) donated or sold below face value to a non-profit or charitable organization; or, (iii) issued for perishable food items.[15] In addition, California permits dormancy fees to be charged on gift cards provided that: (i) the remaining value of the gift card is no more than five dollars ($5.00) each time the fee is assessed; (ii) the fee does not exceed one dollar ($1.00) per month; (iii) there has been no activity on the gift card for 24 consecutive months; (iv) the holder can reload or add value to the gift card; and (v) a statement is printed on the gift card in at least 10-point font stating the amount of the fee, how often the fee will occur, that the fee is triggered by inactivity of the gift card, and at what point the fee will be charged.[16] California's provision on dormancy fees satisfies section 1693*l*-1(b)'s minimum guidelines, and sets forth its own additional conditions and limitations. California's provision on expiration dates is also consistent with section 1693*l*-1(c), and clarifies when an expiration date will be deemed 'clearly and conspicuously' displayed. However, the provision does not set any time restrictions on the expiration dates on gift certificates. Given the foregoing, the EFT Act would only preempt California's Code to extent that the code allows the sale of gift certificates with expiration dates of less than five years. The EFT Act would similarly impact Florida's gift card law. Under that law, the sale of gift cards[17] with any type of post-sale charge or fee (e.g., dormancy fees) imposed on the cards is prohibited.[18] Florida law also expressly prohibits the issuance of gift cards with an expiration date or expiration period unless the expiration date is prominently disclosed in writing at the time the card is provided and: (i) the cards are provided as a charitable contribution and the expiration date is not less than three (3) years, or (ii) the cards are provided as a benefit pursuant to an employee-incentive program and the expiration date is not less than one (1) year.[19] In addition, Florida law permits gift cards with expiration dates if the cards are provided as part of a loyalty or promotional program where the recipient does not have to pay a separate, identifiable charge for the card, or in conjunction with a convention, vacation, conference, or other event having a limited duration.[20] Similar to California's law, Florida's gift card law satisfies section 1693*l*-1(b)'s minimum guidelines, and sets forth its own additional conditions and limitations. It completely prohibits dormancy fees or other post-sale charges without exception, thus providing greater consumer protection than the relevant guidelines in section 1693*l*-1. The Florida provision pertaining to expiration dates also provides greater protection than the comparable provisions of section 1693*l*-1 because it limits those instances in which gift cards may have expiration dates. So the Florida statute would only be preempted to the extent that it allows the sale of gift cards with expiration dates of less than five years. Accordingly, franchise systems must implement rules to satisfy the minimum guidelines under section 1693*l*-1, and then look to the applicable State gift card law to determine what additional requirements, if any, may be required to be in compliance. **II. Electronic Transactions Reform A. Overview** Electronic transactions account for a significant portion of transactions involving merchants.[21] Indeed, "debit card payments have grown more than any other form of electronic payment over the past decade, increasing to 37.9 billion transactions in 2009."[22] On July 21, 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act[23] (the "Dodd-Frank Act"), which amends the EFT Act, in an effort to regulate these transactions. As noted earlier, prior to 2009, the EFT Act only regulated banks and other payment

networks that issued debit and credit cards, as opposed to retailers and merchants.[24] However, the EFT Act, as amended by the Dodd-Frank Act, now affects retailers and merchants, and reallocates the costs of electronic transactions among banks, consumers, and merchants. In particular, the amendment to the EFT Act, which becomes effective on July 21, 2011,[25] imposes the following restrictions:

- Any interchange fee that a debit-card issuer[26] may charge must be "reasonable and proportional to the cost incurred by the issuer with respect to the transaction";[27]
- A card issuer or payment card network[28] may not restrict the number of networks in which an electronic debit transaction may be processed to one such network or two or more affiliated networks;[29]
- A payment card network cannot inhibit the ability of any person to provide a discount or incentive for utilizing a specific form of payment, such as cash, checks, debit cards, or credit cards;[30] and,
- A payment card network cannot inhibit the ability of any person to set a minimum dollar value for the acceptance by that person of credit cards (not debit cards) for more than $10.00.[31]

B. The Cap on Interchange Fees Interchange fees are one of the fees that card-issuing banks charge to a retailer's bank in exchange for processing an electronic transaction.[32] These fees are, in turn, passed on to the retailer, and thus, affect the prices that retailers may charge to consumers for goods and services.[33] The EFT Act, as amended, now requires that interchange fees involving debit card[34] transactions "be reasonable and proportional to the cost incurred by the issuer with respect to the transaction,"[35] effectively putting a cap on interchange fees. The Federal Reserve Board ("FRB") was charged with establishing regulations by April 21, 2011 to explain when an interchange fee would be reasonable and proportional.[36] The current proposed regulations offer two alternative methods for determining an interchange fee.[37] The first would be based on an issuer's costs and be capped at 12 cents per transaction, and the second would impose a "stand-alone" cap of 12 cents per transaction.[38] Either way, "the maximum allowable interchange fee received by covered issuers for debit card transactions would be more than 70 percent lower than the 2009 average, once the new rule takes effect[.]"[39] Thus the adoption of either method would significantly reduce interchange fees passed on to retailers, and help them save billions of dollars.[40] In theory, retailers' savings would be passed on to consumers. Banks argue though that just because retailers 'can' pass on the savings to consumers does not mean that they will.[41] Moreover, any savings passed on to consumers will likely be offset by new or increased bank fees charged to consumers for using their debit cards.[42] Consequently, the cap on interchange fees arguably reallocates the costs of electronic transactions from retailers to consumers. The amended EFT Act will, at least in the short term, benefit franchise systems who accept debit card payments by reducing the overall costs of processing electronic transactions (and thus, doing business). However, the long term effect depends on how, if at all, consumers' spending habits change in response to new or increased bank fees associated with debit card transactions. **C. Regulation of Payment Card**

Networks The amended EFT Act contains three other key provisions that will also impact franchise retailers and merchants. First, payment card networks can no longer restrict a merchant from setting a minimum dollar amount in order to use a credit card.[43] A merchant may set a minimum dollar amount so long as: (1) the merchant does not differentiate between issuers of payment card networks, and (2) does not set a minimum dollar amount that exceeds $10.00.[44] Second, the amended EFT Act prohibits payment card networks from inhibiting merchants from offering a discount or other incentive for utilizing a certain form of payment.[45] Thus retailers or merchants are permitted to offer incentives to their customers for utilizing cash versus a credit card or vice versa. The only restriction is that, in the case of a discount or incentive for use of a debit or credit card, the merchant cannot discriminate on the basis of the card issuer or payment network. And third, the amended EFT Act prohibits an issuer or payment card network from restricting the number of payment card networks on which an electronic debit transaction may be processed.[46] The proposed regulations offer two different schemes to implement such a rule. The first would require "at least two unaffiliated networks per debit card transaction, and the other would require at least two unaffiliated networks per debit card for each type of cardholder authorization method (such as signature or PIN)."[47] Under either proffered method, "issuers and networks would be prohibited from inhibiting a merchant's ability to direct the routing of debit card transactions over any network that the issuer enabled to process them."[48] Merchants were previously prohibited by payment card networks from selecting a preferred network, often resulting in higher costs to merchants.[49] All three of the above provisions allow franchisees greater flexibility. Each provision affords franchisees (especially small retailers or those that deal in low cost items, such as fast food retailers) to reduce business costs by limiting interchange and other credit card fees. Thus the EFT Act, as amended by the Dodd-Frank Act, should be beneficial to franchise systems. **III. Food Safety Reform A. Overview** The Food Safety Modernization Act[50] (the "FSM Act") was signed into law by President Obama on January 4, 2011. The goal of the FSM Act, which amends the Federal Food, Drug, and Cosmetic Act[51] ("FDCA"), is to create an integrated national food system.[52] The FSM Act has five areas of emphasis to ensure food safety at the national level:

> (1) preventing issues which may arise with respect to food safety; (2) inspecting and ensuring compliance with food safety plans among food facilities; (3) responding to food issues; (4) ensuring the safety of imported foods; and, (5) enhancing the relationship between the Food and Drug Administration (the "FDA") and state, local, foreign governments, and other inspection agencies.[53]

To achieve these numerated goals, "the FDA will now have new prevention-focused tools and a clear regulatory framework."[54] Those new tools include the power to "order recalls of tainted foods; increase inspections of domestic and foreign food facilities; require the FDA to draft new rules for the growers and processors of higher-risk fruits and vegetables; and create stricter food safety standards for imported foods[.]"[55] The FSM Act will have varying impacts on franchise systems. The degree of the impact will depend primarily on what role the franchisor and franchisee occupy in the food-supply chain. For instance, several provisions of the FSM Act, such as the registration

requirements, target food manufacturers or distributors, and specifically exclude end-users in the supply chain, such as restaurants.[56] So those provisions would not directly affect franchisee restaurants, but they may have an indirect impact if the suppliers or distributors for those restaurants decide to pass down any costs associated with complying with the new regulations. An overview of the major provisions of the FSM Act and how those provisions may impact franchise systems follows. **B. New Key Provisions 1. Product-Tracing** The FSM Act directs the Secretary of Health and Human Services, in consultation with the Secretary of Agriculture, to establish a system within the FDA that will enhance its ability to track and trace both domestic and imported foods.[57] This product-tracing system is meant to help prevent the outbreak of foodborne illnesses by allowing the government to trace the recipients of tainted foods.[58] To effectuate this goal, recordkeeping requirements will be imposed on certain facilities.[59] Whether franchise restaurants will be subject to such recordkeeping requirements has yet to be determined.[60] In looking at the overall goal of the system though, it is likely that these requirements will be limited to manufacturers and distributors, which would allow the FDA to trace the food from its origin through to the end-user (i.e., restaurant or other retailer). **2. Registration of Food Facilities** Facilities, such as factories, warehouses, or other establishments that manufacture, process, pack, or hold foods must register with the FDA.[61] Restaurants and other food retailers are not included. So franchisee restaurants do not have to comply with the registration requirements; however, franchisors that manufacture, process, or distribute food will have to comply. In those cases, franchisors would be subject to record inspections by the FDA for any food the FDA deems may be adulterated or "presents a threat of serious adverse health consequences[.]"[62] To comply with registration requirements, an entity must provide the FDA with the following information:

- The name and address of each facility at which the registrant conducts business;
- The e-mail address of each contact person of the facility;
- The general food category of any food manufactured, processed, packed or held at the facility; and
- An assurance that the FDA will be permitted to inspect the facility at times permitted under the FSM Act.[63]

A franchisor distributor can have its registration suspended if the FDA determines that the food at the franchisor's facility "has a reasonable probability of causing serious adverse health consequences or death to humans or animals[.]"[64] The effect of a suspension is harsh. Essentially, no food may be imported or exported from the suspended facility, and no food from that facility may enter interstate or intrastate commerce.[65] The food facility will remain suspended until a hearing is held, within two business days (or later if requested by the registrant), to determine if the suspension was proper and remains necessary.[66] If it is determined that the suspension should continue, the food facility must submit a "corrective action plan."[67] The plan must be reviewed within fourteen days, to determine again if the suspension should be vacated, continued, or modified.[68] The

registration portion of the FSM Act goes into effect either on June 4, 2011 or when the FDA issues regulations on registration, whichever is earlier.[69] **3. Preventative Controls** A franchisor distributor may also be subject to the FSM Act's requirement of implementing preventative controls to minimize the occurrences of hazards that may cause foodborne illnesses.[70] Such preventive controls may include the following:

- Sanitation procedures for food contact surfaces;
- Employee training;
- An environmental monitoring program;
- A food allergen control program;
- A recall plan; and
- Supplier verification activities that relate to the safety of food.[71]

Additionally, a food facility must identify and evaluate reasonably foreseeable hazards, identify hazards that may be intentionally introduced (via acts of terrorism), and develop a written analysis of its findings.[72] This provision of the act also requires that a food facility maintain records of its analysis, control measures, and monitoring activities.[73] The preventative control measures, analysis, monitoring, and record-keeping do not apply to "qualified facilities" which include small businesses, which are not yet defined, and facilities whose (i) average annual monetary value of the food sold to "qualified end-users"[74] exceeds the average annual monetary value of the food sold to all other purchasers during the three-year period prior, and (ii) average annual monetary value of the food sold during such period is less than $500,000.[75] Regulations are not due under this portion of the act until June 4, 2012.[76] **4. Mandatory Recalls** If the FDA determines that there is a reasonable probability that a food is adulterated or misbranded and the "use of such [food] will cause serious adverse health consequences or death" the FDA must provide a food facility with an opportunity to stop distributing such food.[77] However, if the food facility does not voluntarily cease distribution of the product, then the FDA may, as it deems necessary, order the food facility to stop distribution of the food.[78] The FDA may also order the food facility to notify all persons dealing with that food product (e.g., restaurants and other food retailers) to stop distribution of that food.[79] Accordingly, the mandatory recall, which is currently effective, will impact both franchisors who distribute food and franchisee restaurants. A restaurant will receive notice to cease its distribution of such adulterated or misbranded food because a distributor is required to provide such notice. The procedures for obtaining rescission of the recall order are identical to those discussed above for the registration of facilities.[80] **IV. Healthcare Reform A. Overview** The Patient Protection and Affordable Care Act[81] ("PPACA"), which was passed into law on March 23, 2010, represents a significant shift in and reform of the U.S. healthcare system. PPACA, as modified by the Health Care and Education Reconciliation Act of 2010[82], amends, *inter alia*, the rights and responsibilities of employers with respect to the provision of healthcare coverage for employees. Specifically, the Act

sets forth several new mandatory health insurance coverage provisions, being phased in over the next few years, targeting employer-sponsored group health plans ("GHP" or "GHPs") that are obligated to provide "essential health benefits"[83]. Hence virtually all businesses, including franchise systems, will be directly or indirectly affected by PPACA. **B. The "Grandfather" Exception** GHPs that had at least one participant in the plan as of the date PPACA was enacted (i.e., March 23, 2010) are granted 'grandfather' status.[84] This designation is important because 'grandfathered' GHPs are subject to only certain provisions of PPACA, whereas 'non-grandfathered' GHPs are required to meet all of the new PPACA requirements. Thus it is important for employers to first determine if their GHP are 'grandfathered' before determining how and to what extent their GHP must be amended. PPACA does not specify what acts or changes to a GHP may cause a GHP to lose its 'grandfather' status. The U.S. Departments of Treasury, Labor, and Health and Human Services have, however, offered some guidance on what employers must do to maintain status as a grandfathered health plan and what actions will cause a GHP to lose its grandfathered status.[85] The Interim Final Regulations provide that an employer must: include both a statement describing the benefits provided under the plan in any plan materials provided to participants, as well as contact information for questions and complaints; and, maintain sufficient records documenting the terms for the GHP that were in effect on March 23, 2010, and make those records available for examination for as long as grandfather status is sought.[86] In addition, the Interim Final Regulations provide that a GHP will lose its grandfather status if an employer makes a significant change to the benefit package (as compared to the package offered on March 23, 2010) such as: (i) entering into a new policy, certificate, or contract of insurance then the GHP;[87] (ii) making any increase in a percentage cost-sharing requirement (such as co-insurance);[88] (iii) eliminating all or substantially all benefits to diagnose or treat a particular condition;[89] (iv) increasing a fixed-amount cost-sharing requirement, such as a deductible or out of-pocket limit, by more than the maximum percentage increase (i.e., medical inflation plus 15%), or such as a co-payment, by the maximum percentage increase or $5;[90] (v) decreasing employer contributions;[91] or, (vi) imposing a new overall annual limit (if no lifetime or annual limit was in effect), or a new overall annual limit that is greater than the lifetime limit in effect, or decreases an existing overall annual limit.[92] Notwithstanding the foregoing, a GHP will not cease to be grandfathered if one or more participants enrolled on March 23, 2010, cease to be covered provided that the GHP has continuously covered someone since that time.[93] A GHP will also not lose its grandfather status if family members of a participant are enrolled in the plan after March 23, 2010, or new employees are enrolled into the plan after March 23, 2010.[94] Lastly, a GHP will not lose its grandfather status if changes are made to premiums, to comply with Federal or State law, to voluntarily comply with PPACA, or to the third-party administrator, provided any such changes are consistent with the foregoing rules and regulations.[95] **C. Employer Compliance Requirements for 2011** The first set of PPACA provisions became effective on September 23, 2010 (or January 1, 2011 for calendar year plans).[96] These new provisions require the following:[97] **a) Lifetime and Annual Limits*** GHPs may not establish lifetime or unreasonable annual limits (as defined by Section 223 of the Internal Revenue Code of 1986) on the dollar value of benefits for any participant or beneficiary.[98] **b) Coverage Rescission*** GHPs may not rescind an enrollee's coverage

once that enrollee is covered, except in the event of fraud or intentional misrepresentation of a material fact and where prior notice has been given to the enrollee.[99] **c) Preventive Healthcare Coverage** GHPs must provide, at a minimum, coverage (and may not impose any cost-sharing requirements) for immunizations and certain preventive care, including such additional preventive care and screenings provided for infants, minors, and women, in the comprehensive guidelines supported by the Health Resources and Services Administration.[100] This provision does not preclude GHPs from providing coverage for additional preventive care services or denying coverage for services that are not recommended by the United States Preventive Service Task Force. **d) Dependent Coverage*** GHPs that provide dependent coverage for children must continue to provide such coverage until the child turns 26 years old or gets married, whichever occurs first.[101] However, GHPs are not required to make similar coverage available for the child of a child receiving dependent coverage.[102] **e) Pre-Existing Condition Exclusion*** GHPs may not impose any pre-existing condition exclusion on enrollees under the age of 19.[103] **f) Discrimination Based on Salary** A plan sponsor of a GHP (other than a self-insured plan) may not establish eligibility rules relating to insurance coverage (including continued eligibility) of any full-time employee under the terms of the GHP that are based on the total hourly or annual salary of the employee or otherwise establish eligibility rules that have the effect of favoring higher wage employees. This limitation though does not prevent a plan sponsor from establishing different contribution requirements for enrollment based on hourly or annual salary.[104] **g) Reporting Requirements*** GHPs must submit an annual report to the Secretary and enrollees on whether the benefits under the plan or coverage: (i) improved health outcomes through the implementation of quality reporting, effective case management, care coordination, chronic disease management, and medication and care compliance initiatives, (ii) implemented activities to prevent hospital readmissions through a comprehensive program for hospital discharge planning, and post-discharge reinforcement by an appropriate health professional, (iii) implemented activities to improve patient safety and reduce medical errors through the appropriate use of best clinical practices, evidence-based medicine, and health information technology, and (iv) implemented wellness and health promotion activities.[105] The penalties for noncompliance with the reporting requirements remain to be determined, however, the Act provides room for exceptions for GHPs that substantially comply with requirements. Employers must now include on each employee's W-2 form the aggregate cost of employer-sponsored coverage, excluding though the amount contributed to any health or Archer medical savings account and the amount of an employee contribution to a flexible spending arrangement.[106] **h) Appeals Process** GHPs must implement an appeals process for appeals of coverage determinations and claims. The process must, at a minimum: (i) have an internal claims appeal process; (ii) provide notice to enrollees of available internal and external appeals processes; (iii) allow an enrollee to review their file, present evidence and testimony as part of the process, and receive continued coverage pending the outcome of the appeal; and, (iv) provide an external binding review process for such plans and issuers that includes the consumer protections set forth in the Uniform External Review Model Act promulgated by the National Association of Insurance Commissioners.[107] **i) Health Reimbursement/Flexible Spending Accounts** Health spending accounts, Archer medical savings

accounts, flexible spending and other health reimbursement arrangements may no longer reimburse expenses incurred for non-prescription drugs, other than insulin.[108] Further, the additional tax on distributions from health spending accounts for non-qualified medical expenses will be increased from 10% to 20%.[109] Likewise, the additional tax on distributions from Archer medical savings accounts for non-qualified medical expenses will be increased from 15% to 20%.[110] Finally, employer contributions to a flexible spending arrangement will not be treated as a qualified benefit unless the cafeteria plan limits an employee's contributions for any taxable year to $2,500.[111] **V. Menu-Labeling Reform A. Overview** In addition to healthcare, PPACA impacts franchise systems operating in the food industry. While the main focus of PPACA was to reform the nation's healthcare system, it contains an important provision requiring certain restaurants to provide nutritional data on menus by amending the Nutrition Labeling and Education Act[112] ("NLEA"). Prior to PPACA there was a lack of consistency among the various jurisdictions regarding what disclosures, if any, restaurants were required to make to consumers. This new federal legislation, therefore, provides larger franchise systems with a single mandate governing nutritional disclosures. Under the amended NLEA, restaurants and similar retail food establishments that are part of a chain of 20 or more locations must disclose calorie and nutritional information for standard food items.[113] Although currently effective, the final regulations governing how these provisions will be implemented are not yet in place. The FDA will issue final rules before the end of 2011.[114] It is thus prudent for franchise systems to become familiar with the labeling law and the proposed regulations now. **B. Preemption of State and Local Nutrition Regulations** The NLEA sought to clarify the FDA's authority to require nutrition labeling on foods.[115] In that capacity, the NLEA requires certain disclosures on food packages in order to inform consumers.[116] Prior to 2010, the NLEA specifically exempted restaurants from its requirements, thus restaurants were not required to display nutritional information on their menus.[117] In the absence of any federal mandates, a number of states, cities, and even counties enacted regulations requiring such disclosures.[118] The result was a myriad of different food disclosure laws governing franchise systems.[119] For example, California was the first state to enact a law requiring menu-labeling. It required chain restaurants with 20 or more locations to provide calorie information on their menus.[120] Massachusetts, Maine, Oregon, and New Jersey each adopted similar laws,[121] and several cities and counties, including New York City, have also passed laws that require restaurants to make certain nutritional disclosures on their menus.[122] These state and local laws vary in terms of which restaurants are covered by their terms and the type of information required to be displayed.[123] PPACA expressly preempts state and local laws that attempt to govern restaurant chains with 20 or more locations.[124] So although the enactment of the federal legislation on this subject will not provide complete uniformity since it only applies to large chains,[125] it will make disclosure requirements uniform for those franchise systems that fall under its mandate. Accordingly, menu-labeling laws such as those in California, New Jersey, Massachusetts and Maine would be preempted.[126] Restaurants with fewer than 20 locations must still comply with state and local laws governing menu-labeling, unless the restaurant opts to voluntarily register to become subject to the Affordable Care Act's menu-labeling provision. As such, smaller franchise systems must remain apprised of state and local law governing this

subject. An overview of such laws (not an exhaustive list) is provided below.

- *New York City*: The regulation requires that "all chain restaurants with fifteen or more establishments nationally to make statements showing calorie content[.]" The "calorie information must be presented clearly and conspicuously, adjacent to or in close proximity to the menu item, and the font and format of calorie information must be as prominent in size and appearance as the name or price of the menu item."[127]

- *King County (Seattle), Washington*: These regulations require chain restaurants with fifteen or more national locations as well one million dollars in annual sales to display calorie, fat, sodium, and carbohydrate information for both food and beverage products on their menus.[128] If a menu board is used, calorie information must be posted on it. The other nutritional information, such as sodium content, must be provided in a plainly visible format at the point of ordering.[129] Nutritional information does not have to be provided for items that appear on the menu for less than 90 days, "unopened, prepackaged foods; foods in salad bars, buffet lines, cafeteria service, and other self serve arrangements; and food served by weight or custom-ordered quantity."[130]

- *Philadelphia*: This law also applies to restaurants with fifteen or more establishments nationally.[131] A restaurant subject to the law must display "calories, saturated fat, trans fat, sodium, and carbohydrates" on menus. Where a menu board is used, the board must display calorie information. If food is served in a wrapper or box, then nutritional information must appear on such material.[132]

- *Oregon*: Oregon's law applies to "chain restaurants with 15 or more outlets nationwide to post the calorie content for each menu item on menus, menu boards…and food tags."[133] Upon a customer's request, a restaurant must provide information on a food item's fat, carbohydrates, and sodium content. Temporary items on the menu, defined as items that remain on the menu for less than 90 days per year, are exempt from disclosure requirements. Oregon's state-wide law also preempts any local rules on menu-labeling.[134]

C. Scope of Federal Menu-Labeling Regulations PPACA requires certain restaurants to provide calorie and nutrition information on their menus and drive-through signs.[135] The act covers businesses such as "fast food establishments, bakeries, coffee shops, and certain grocery and convenience stores." But "[m]ovie theaters, airplanes, bowling alleys, and other establishments whose primary purpose is not to sell food would not be subject to the proposed regulation."[136] Specifically, Section 4205 of PPACA states that it applies to "a restaurant or similar retail food establishment that is part of a chain with 20 or more locations doing business under the same name…and offering for sale substantially the same menu items…." The proposed regulations suggest that only establishments "whose primary business activity is the sale of food to consumers" will be subject to the mandatory nutritional disclosure requirements.[137] The law also applies to restaurants with salad bars, cafeteria lines, and other self-service facilities.[138] Where such a set-up is employed, the restaurant is required to "place adjacent to each food offered a sign that lists

calories per displayed food item or per serving."[139] Franchise systems covered by the law would need to comply by providing "calorie information on 'menus' and 'menu boards,' and other nutrition information upon request, for 'standard menu items'."[140] Standard menu items would not include the following: Items not listed on the menu, such as:

- Condiments;
- Daily specials;
- Temporary menu items appearing on the menu for less than 60 days;
- Custom orders;
- Other food items that are a part of a "customary market test" and remain on the menu for less than 90 days.[141]

Those entities subject to the menu-labeling requirements would have to have a reasonable basis for its disclosures. The reasonable basis could stem from "nutrient databases, cookbooks, laboratory analyses, and other reasonable means…."[142] As previously noted, PPACA preempts any state and local laws that would seek to impose any different nutritional labeling requirements for food sold in establishments covered by the federal act.[143] Accordingly, smaller franchise systems, specifically those with fewer than 20 locations, would still be governed by any state or local law addressing menu-labeling requirements. Further, restaurants not covered by the federal requirement may nevertheless voluntarily register with the FDA to become subject to the menu-labeling provisions of PPACA.[144] Upon registering, such restaurants would no longer be subject to state or local regulations, and would need only to comply with the federal act on menu-labeling.[145] A restaurant located in a state or locality with more strict laws governing menu-labeling may find registration with the FDA to be beneficial. The FDA issued proposed regulations implementing the menu-labeling provision of PPACA on April 6, 2011. The FDA is accepting feedback on its proposal on or before June 6, 2011. The FDA will issue final regulations implementing the menu-labeling requirements before the end of 2011.[146] Although proposed federal regulations have no legal effect, they offer guidance on how the FDA may implement the menu labeling provisions of PPACA.[147] The proposed regulations offer definitions for the relevant terms of PPACA and make clear that these regulations will most certainly impact franchise systems. For example, the FDA elaborates on the term "same name" as provided in the Section 4205 of PPACA. "Same name" would include "names that are either exactly the same, or are slight variations on each other due, for example, to the region location or size."[148] Also the FDA defines "offering for sale substantially the same menu items" as "offering for sale menu items that use the same general recipe and are prepared in substantially the same way with substantially the same food components, even if the name of the menu item varies."[149] These definitions are designed to capture chain-like restaurants and thus will impact various franchise systems. **CONCLUSION** The preceding laws are some of the top legal developments affecting franchise systems in 2011. They signify a trend toward greater consumer

protection and rights through increased federal regulations. This expansion of federal regulations will have both a positive and negative impact on franchised businesses. On the positive side, the new federal gift card laws, which set the minimum guidelines for the issuance of gift cards or certificates, will provide a degree of uniformity for franchised businesses operating in multiple states. Similarly, the new nutrition menu-labeling requirements will also provide a degree of uniformity to franchises operating in various states. And the new regulations on electronic funds transfers will allow small franchisees and fast food retailers to minimize their costs associated with debit and credit card transactions, thus providing an avenue for greater profit margins. On the negative side, the cap on interchange fees may alter consumer spending habits if banks shift the costs of debit and credit card transactions to consumers. In addition, the new food safety regulations may also cause a shifting of fees. The shift though would likely be from distributors, looking to defray the cost of compliance with the new laws, to food retailers. Last, the cost of employee health coverage could significantly increase for non-grandfathered employers as a result of implementing new compliance measures and/or insurance companies raising rates in response to the new healthcare reform laws. Many of these laws, although effective, are still subject to change. So it is important for franchise systems to continue to monitor to see how the laws develop

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[1] 15 U.S.C. § 1693(b) (2010). [2] See id. [3] *Am. Express Travel Related Servs. Co. v. Sidamon-Eristoff*, - - F. Supp. 2d - -, 2010 WL 4722209, at * 25 (D.N.J. Nov. 13, 2010). [4] § 1693*l*-1(b); *see* 12 C.F.R. § 205.20(d). [5] § 1601(a). [6] § 1693*l*-1(b)(2)-(3); 12 C.F.R. § 205.20(d). This exception may be further limited by any additional requirements set forth by the Board of Governors of the Federal Reserve System under section 1693*l*-1(d). [7] § 1693*l*-1(b)(4). [8] § 1693*l*-1(c); 12 C.F.R. § 205.20(e). [9] § 1693*l*-1(c); *see* 12 C.F.R. § 205.20(e); *Am. Express Travel Related Servs. Co*., 2010 WL 4722209, at * 25. Consumers have five years to spend the funds on the card even if the card itself expires and needs to be replaced. 12 C.F.R. § 205.20(e). [10] *See, e.g.,* Cal. Civ. Code § 1749.5; Fla. Stat. § 501.95; N.Y. Gen. Bus. Law § 129; Tex. Bus. & Comm. Code Ann. § 604.001 *et seq*. For a complete list of State gift card laws, visit the website for the National Conference of State Legislatures at http://www.ncsl.org/default.aspx?tabid=12474. [11] *See* David P. Weber, *Gift Cards: What Franchisors Should Know*, Franchising World, July 2006; *see also* First Data Corp., Gift Cards and Gift Certificates and Recent Legislation, http://www.ncsl.org/ default.aspx?tabid=12474 (last visited Apr. 20, 2011). [12] § 1693q; Am. Express Travel Related Servs. Co., 2010 WL 4722209, at * 25. [13] See § 1693q; Am. Express Travel Related Servs. Co., 2010 WL 4722209, at * 25. [14] The term 'gift certificate' is defined in California's Code as value held in trust by the issuer on behalf of the beneficiary of the certificate. Cal. Civ. Code § 1749.6. [15] Cal. Civ. Code § 1749.5(a), (d). [16] Cal. Civ. Code § 1749.5(e). [17] The term 'gift certificate' is defined in the statute as "a certificate, gift card, stored value card, or similar instrument purchased for monetary consideration when the certificate, card, or similar instrument is redeemable for merchandise, food, or services regardless of whether any cash may be paid to the owner of the certificate, card, or instrument as part of the redemption transaction." Fla. Stat. § 501.95(1)(b). [18] Fla. Stat. § 501.95(2)(a). [19] Id. [20] Id. [21] Debit Card Interchange Fees and

Routing; Proposed Rule, 75 Fed. Reg. 81722, 81723 (proposed Dec. 28, 2010) [hereinafter Debit Card Proposed Regulations]. [22] Debit Card Proposed Regulations, *supra* note 21. [23] Pub L. No. 111-203, 124 Stat 1376. [24] *See* discussion *supra* Part I.A. [25] 15 U.S.C. § 1693o-2(a)(9). [26] A "debit-card issuer" is defined as "the person holding the asset account that is debited through an electronic debit transaction." § 1693o-2(a)(6)(B). [27] § 1693o-2(a)(2). [28] A "payment card network" is defined as "an entity that directly, or through licensed members, processor, or agents, provides the proprietary services, infrastructure, and software that route information and date to conduct debit card or credit card transaction authorization, clearance, and settlement, and that a person uses in order to accept as a form of payment a brand of debit card, credit card or other device that may be used to carry out debit or credit transactions." § 1693o-2(c)(11) [29] §1693o-2(b)(1). [30] §1693o-2(b)(2). [31] §1693o-2(b)(3). [32] Michael Laidhold, *Card Interchange Fees Under Fire*, Franchise Update, Dec. 15, 2010, http://www.franchise-update.com/article/1294. [33] *Id.*; *see also* Connie Prater, *Debit Card Swipe Fee Debates Pits Banks vs. Merchants*, CreditCards.com, Apr. 14, 2011, http://www.creditcards.com/credit-card-news (noting that a small retailer can pay between $1,500 to $6,000 per month in fees related to electronic transactions depending on business). [34] "Debit card" is defined under the act as any card or other device issued for use through a payment card network to debit an asset account, whether authorization is based on signature, PIN, or other means, and includes general pre-paid cards as defined under section 1693*l*-1(a)(2)(A). § 1693o-2(c)(2). [35] § 1693o-2(a)(2); *see* Debit Card Proposed Regulations, *supra* note 21, at 81727. [36] § 1693o-2(a)(3)(A). The controversial nature of this law has caused the FRB to delay issuing its final regulations. Prater, *supra* note 33. [37] Press Release, Board of Governors of the Federal Reserve System, (Dec. 16, 2010), *available at* http://www.federalreserve.gov/newsevents/press/bcreg/20101216a.htm [hereinafter FRB Press Release]. [38] *Id.* [39] *Id.* [40] Prater, *supra* note 33. [41] Id. [42] Id.; see also Timothy J. Muus, Payment Card Regulation and the (Mis)application of the Economics of Two-Sided Markets, 2005 Colum. Bus. L. Rev. 515, 542 (2005). [43] § 1693o-2(b)(3). The term "credit card" has the same meaning as in section 1602. § 1693o-2(c)(2). [44] *Id.* [45] § 1693o-2(b)(2). [46] § 1693o-2(b)(1). [47] FRB Press Release, *supra* note 37. [48] FRB Press Release, *supra* note 37. [49] Debit Card Proposed Regulations, *supra* note 21, at 81752. [50] Pub. L. No. 111-353, 124 Stat. 424. [51] 21 U.S.C. § 301 *et seq*. [52] Michael Taylor, Deputy Commissioner for Foods, Food & Drug Admin., Update on Implementation of the Food Safety Modernization Act (Apr. 6, 2011), *available at* http://www.fda.gov/Food/FoodSafety/ FSMA /ucm250338.htm) [hereinafter Update on FSMA]. [53] U.S. Food & Drug Admin., Background on the FDA Food Safety Modernization Act, *available at* http://www.fda.gov/Food/FoodSafety/FSMA/ucm239907.htm (last visited Apr. 15, 2011) [hereinafter Background on FSMA]. [54] U.S. Food & Drug Admin., Frequently Asked Questions, *available at* http://www.fda.gov/Food/ FoodSafety/ FSMA/ucm247559.htm (last visited April 15, 2011) [hereinafter FDA Frequently Asked Questions]. [55] Alan J. Liddle, *President Obama Signs Food Safety Bill*, Nation's Restaurant News, Jan. 4, 2011, http://www.nrn.com/article/president-obama-sidngs-food-safety-bill. [56] FDA Frequently Asked Questions, *supra* note 54. [57] 21 U.S.C. § 2223(c). [58] *See* § 2223(a)(1). [59] § 2223(d). [60] § 2223(e). [61] 21 U.S.C. § 350d(c). [62] § 350(a)(1). The inspection of a franchisor's records would not "extend to recipes for food, financial data, pricing data,

personnel data, research data, or sales data (other than shipment data regarding sales). § 350d(d)(4). [63] § 350d(a)(2). [64] § 350d (b)(1). [65] § 350d (b)(4). [66] § 350d (b)(2). [67] § 350d(b)(3). [68] Id. [69] § 350d(b)(6). [70] § 350g(a). [71] § 350g(o). [72] § 350g(b). [73] § 350g(h). [74] That is, consumers, restaurants, or other food retailers. § 350g(l)(4)(B). [75] § 350g(l). [76] § 350g(n). [77] § 350g(l)(a). [78] § 350l(b) [79] *Id.* [80] *See* discussion *supra* Part II.B.2. [81] Pub. L. No. 111-148, 124 Stat. 119. [82] Pub. L. No. 111-152, 124 Stat. 1029. [83] "Essential health benefits" include at least the following services: ambulatory patient services; emergency services; hospitalization; maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; and, pediatric services, including oral and vision care. Pub. L. No. 111-148, Title I, § 1302. [84] § 1251, 124 Stat. 119, 161; 75 Fed. Reg. 34,538, 34,541 (June 17, 2010). [85] 75 Fed. Reg. 34,538, 34,541. [86] Id. [87] Id. [88] 75 Fed. Reg. 34,538, 34,543. [89] Id. [90] Id. [91] Id. [92] 75 Fed. Reg. 34,538, 34,544. [93] § 1251(b), 124 Stat. 119, 161; 75 Fed. Reg. 34538, 34541. [94] 75 Fed. Reg. 34538, 34541. [95] 75 Fed. Reg. 34538, 34544. [96] This article focuses only on the requirements that became effective as of September 23, 2010. [97] "Grandfathered" GHPs are only required to comply with those provisions denoted by an asterisk. [98] § 2711, 124 Stat. 119, 131. [99] § 2712, 124 Stat. 119, 131. [100] § 2713, 124 Stat. 119, 131-32. [101] § 2714, 124 Stat. 119, 132. [102] Id. [103] § 2704, 124 Stat. 119, 154, 893. [104] § 2716, 124 Stat. 119, 135. [105] § 2717, 124 Stat. 119, 135-36. [106] § 9002, 124 Stat. 119, 853-54. [107] § 2719, 124 Stat. 119, 137-38. [108] § 9003, 124 Stat. 119, 854. [109] § 9004(a), 124 Stat. 119, 854. [110] § 9004(b), 124 Stat. 119, 854. [111] § 9005, 124 Stat. 119, 855. [112] Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified as amended in scattered sections of 21 U.S.C.); Statement on Signing the Nutrition Labeling and Education Act of 1990, 26 Weekly Comp. Pres. Doc. 1795 (Nov. 8, 1990). [113] Dept. of Health & Human Services, Food & Drug Administration, Docket No. FDA-2011-F-0172, Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants & Similar Retail Food Establishments Notice of Proposed Rulemaking, Preliminary Regulatory Impact Analysis (2011) [hereinafter Menu-Labeling Impact Analysis] http://www.fda.gov/downloads/Food/LabelingNutrition/UCM249276.pdf. [114] Press Release, U.S. Food & Drug Admin., FDA Proposes Draft Menu and Vending Machine Labeling Requirements, Invites Public to Comment on Proposals (Apr. 1, 2011) [hereinafter FDA Press Release]. [115] N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F. Supp. 114, 118 (2d Cir. 2009). [116] Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, 76 Fed. Reg. 19192, 19193 (proposed Apr. 6, 2011) [hereinafter FDA Proposed Regulations]. [117] Tamara Schulman, *Menu Labeling: Knowledge for a Healthier America*, 47 Harv. J. on Legis. 587, 592 (2010). [118] *Id.* [119] Michelle I. Banker, I Saw The Sign: The New Federal Menu-Labeling Law and Lessons from Local Experience, 65 Food & Drug L.J. 901, 907-908 (2010). [120] *Id.* at 908. [121] *Id.* [122] *Id.* [123] Id. [124] *Id.* at 911. [125] *Id.* [126] Nutrition Labeling in Chain Restaurants, http://www.cspinet.org/new/pdf/ml_bill_summaries_09.pdf (last visited Apr. 22, 2011) [hereinafter Legislation Summary]. [127] N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.2d 114, 121 (2nd Cir. 2009). [128] Legislation Summary, *supra* note 126. [129] Id. [130] *Id.* [131] *Id.* at 2. [132] *Id.* [133] *Id.* at 7

[134] *Id.* [135] Schulman, *supra* note 117, at 587. [136] FDA Press Release, *supra* note 114. [137] FDA Proposed Regulations, supra note 116. [138] 21 U.S.C. § 343(q)(5)(H)(iii). [139] *Id.* [140] FDA Proposed Regulations, *supra* note 116. [141] § 343(q)(5)(H)(vii). [142] § 343(q)(5)(H)(iv). [143] § 343(q)(5)(H)(x). [144] Menu-Labeling Impact Analysis, *supra* note 113, at 1-2. [145] 21 U.S.C. § 343-1(a)(4) [146] *Id.* [147] *Sweet v. Sheanan,* 235 F.3d 80 (2d Cir. 2000). [148] FDA Proposed Regulations, supra note 116. [149] *Id.* [*] *Mr. Murray is greatly indebted to Adrian Felix and Yolanda Paschal, associates at Carlton Fields, P.A., for their time, assistance and valuable contributions to these materials.*

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