

April 8th, 2022

Division of Dockets Management
Food and Drug Administration
Department of Health and Human Services
5630 Fishers Lane, Room 1061
Rockville, MD 20852

Re: Comment on Docket No. FDA-2022-P-0110; Citizen Petition Seeking FDA Rulemaking to Update the Required Nutrition Information at Chain Restaurants to Include Added Sugars for Standard Menu Items

The **undersigned organizations** respectfully submit the following comment in support of the Citizen Petition filed by Center for Science in the Public Interest (CSPI), Consumer Reports, and Dr. Jason Block of Harvard Medical School/Harvard Pilgrim Health Care Institute on January 31, 2022 (hereinafter “the petition”).¹

The petitioners have requested that the Commissioner of Food and Drugs amend 21 C.F.R. § 101.11(ii)² to include added sugars for standard menu items, which is necessary to align the rule with the information required by the Food and Drug Administration (FDA) in the Nutrition Facts label,³ and to enable consumers to make informed choices and maintain healthy dietary practices when ordering from restaurants. In this comment, we outline the real and potential risks posed by gaps in the current rule and the need for them to be updated.

I. Americans should have access to added sugars information across FDA-regulated foods

Providing accurate and consistent nutrition information across FDA regulated foods and beverages is essential to ensure that consumers are well informed. Historically, the FDA has worked to ensure that the nutrition information maintained by restaurants is harmonized with the information the FDA has required to be published in Nutrition Facts. For example, when the FDA issued its proposed rule for menu labeling in 2011, it required that restaurants disclose *trans* fat, a nutrient not expressly required for restaurants under the Affordable Care Act (ACA).⁴ Including added sugars in restaurant nutrition information will align restaurant disclosures with the added sugars disclosures found in Nutrition Facts. In 2016, the FDA issued a final rule updating Nutrition Facts to require, among other changes, a declaration for added sugars, which are sugars added during the processing of foods, distinguishable from the naturally occurring sugars present in milk, fruits, and vegetables. The 2016 rule also established a Daily Reference Value (DRV) for added sugars of 50 grams for a 2,000 calorie per day diet, derived directly from

¹ <https://www.regulations.gov/document/FDA-2022-P-0110-0002>

² *Specifically*, 21 C.F.R. § 101.11 (2021), *promulgated in*: Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments, Final Rule, 79 Fed. Reg. 71155 (Dec.1, 2014). [Hereinafter: Food Labeling; Nutrition Labeling of Standard Menu Items, Final Rule].

³ *See* Food Labeling: Revision of the Nutrition and Supplement Facts Labels, Final Rule, 81 Fed. Reg. 33741 (May27, 2016) [Hereinafter: Food Labeling: Revision of the Nutrition and Supplement Facts Labels, Final Rule].

⁴ Food Labeling: Nutrition Labeling of Standard Menu Items, Proposed Rule, 76 Fed. Reg. at 19212. The FDA also declined to require that restaurants report complex carbohydrates, as this nutrient, while required under the statute, had been removed by the agency from Nutrition Facts regulations. *Ibid* at 19211.

the recommendations of the Scientific Report of the 2015 Dietary Guidelines Advisory Committee, which recommended limiting added sugars intakes to less than 10 percent of calories.⁵ Yet as the petition outlines, the rule requiring restaurant nutrition disclosures was finalized prior to these actions, and therefore does not include a disclosure for added sugars.

FDA has authority to update the rule to require added sugars to be disclosed in restaurants. This is because the ACA authorizes the FDA to require, by regulation, disclosure of additional nutrients if it determines that the nutrient “should be disclosed for the purpose of providing information to assist consumers in maintaining healthy dietary practices.”⁶

And we know that this information is desperately needed, as Americans are far from meeting even the more generous target of 10 percent of calories from added sugars. The most recent Dietary Guidelines for Americans show that adults and children in every age group (2-60+), regularly exceed the daily limit for added sugars, eating more than 50 grams per day,⁷ signaling the increasing need for federal guidance to remain clear and consistent.

II. Disclosure of added Sugars in restaurant menu items would assist consumers in maintaining healthy dietary patterns

The food choices Americans make away from home contribute to a large part of the overall diet. Food prepared outside the home is a significant source of American’s calories, nutrients, and food expenses.⁸ According to a 2018 report by the Economic Research Service, Americans eat out between 4.2 and 5.5 occasions per week.⁹

Prior to the COVID-19 pandemic, over a third of US adults consumed fast food on any given day.¹⁰ Food prepared away from home has accounted for a third of the average person’s calories¹¹ and nearly 40 percent of total food expenditures.¹² And while restaurant sales slumped in 2020 due to social distancing measures implemented to address the pandemic, sales have rebounded significantly since then, hitting a new all-time high of \$67.3 billion in revenue in May 2021.¹³

Additionally, consumers are often presented with extremely unhealthy options when eating

⁵ Food Labeling: Revision of the Nutrition and Supplemental Facts Labels; Supplemental Proposed Rule to Solicit Comment on Limited Additional Provisions, 40 Fed. Reg. 44303, 44303-4 (July 27, 2015).

⁶ 21 U.S.C. § 343(5)(H)(vi).

⁷ U.S. Department of Agriculture and U.S. Department of Health and Human Services. Dietary Guidelines for Americans, 2020-2025. 9th Edition. December 2020. Available at [DietaryGuidelines.gov](https://www.dietaryguidelines.gov).

⁸ USDA Economic Research Service. Limited-service and full-service restaurants accounted for 73 percent of food-away-from-home spending in 2019. Last updated July 24, 2020. <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=98897>, Accessed April 6, 2022 [Hereinafter: USDA ERS Food-away-from-home spending 2019].

⁹ Households with incomes at or below the Federal poverty line ate out about 4.2 times per week, whereas households above the poverty line ate out about 5.2 times per week. Saksena et al. America’s Eating Habits: Food Away from Home, USDA Economic Research Service. September 2018. <https://www.ers.usda.gov/publications/pub-details/?pubid=90227>. Accessed April 6, 2022.

¹⁰ Fryar C, et al., Fast Food Consumption Among Adults in the United States, 2013–2016. Caloric Intake From Fast Food Among Adults: United States, 2007–2010. NCHS Data Brief No. 322, October 2018. <https://www.cdc.gov/nchs/products/databriefs/db322.htm>. Accessed April 6, 2022.

¹¹ USDA Agricultural Research Service. What We Eat in America, NHANES 2017-2018. Table 9. Away from Home.

https://www.ars.usda.gov/ARSUserFiles/80400530/pdf/1718/Table_9_AWY_GEN_17.pdf. Accessed April 6, 2022 (Reporting that food and beverages consumed away from home account for 32 percent of energy for males and females age 2 and over in 2017-18).

¹² USDA Economic Research Service. Food Dollar Series Nominal Data [data file]. Retrieved from: <https://www.ers.usda.gov/data-products/food-dollar-series/download-the-data/>. Accessed April 6, 2022. (Reporting that 38.5 cents of every dollar spent by U.S. consumers on domestically produced food in 2019 went to food service establishments, such as restaurants and other eating places).

¹³ Bartash J. Restaurants Come Back from Brink as Americans Spend More Than Ever Eating Out. Market Watch. June 15, 2021.

<https://www.marketwatch.com/story/restaurants-come-back-from-brink-as-americans-spend-more-than-ever-eating-out-11623784825>.

out, including meals that are excessively high in added sugars. The average nutrient profile of a default combination meals served by fast food chains in the U.S. includes 68 grams of total sugar, much of it from beverages sweetened with added sugars.¹⁴ *Sweet Excess*, a report published in 2021 by CSPI, compared added sugars in fountain drinks at the largest fast-food chains and found that even most “small” drinks exceed the 50-gram DRV for added sugars.¹⁵

Providing information about added sugars could help support consumers in making healthy dietary choices and avoiding overconsumption. Overconsumption of added sugars can contribute to weight gain, type 2 diabetes, cardiovascular disease, dental cavities, and other chronic diseases.^{16,17} While the 2020-2025 Dietary Guidelines for Americans advises individuals to limit intake of added sugars,¹⁸ in order to follow this advice, consumers must have access to the information to distinguish between added sugars and naturally occurring sugars, which do not have a daily limit.

The lack of federal guidance around added sugars reporting has led to varied reporting across chain restaurants, creating confusion for consumers, especially when they are selling similar fare. While an extraordinarily savvy consumer might be able to estimate the added sugars for some items based on total sugar and any ingredients the restaurant chooses to report voluntarily,¹⁹ even those prepared with the best information and advice could not figure out the added sugars in items that contain milk, fruit juice, or other naturally occurring sources of sugar, unless the restaurant chain chooses to disclose it voluntarily.

For example, a customer at Smoothie King can learn that nearly half the 86 grams of sugar in its 20 oz. “Pineapple Surf” smoothie are added sugars, because that restaurant voluntarily discloses added sugars information.²⁰ But if that same customer were to buy a 20 oz. “Aloha Pineapple” smoothie from Jamba Juice, they would have no way to learn what percent of the 77 grams of sugar in that beverage were added sugars, as opposed to naturally occurring sugars from juice.²¹

Similarly, a customer at Dunkin’ can see from its nutrition information that there are 46 grams of added sugars out of 69 grams of total sugar in the chain’s “Caramel Swirl Hot Latte with Skim Milk – Large.”²² But a customer ordering a “Caramel Bruleé Latte – Venti” at Starbucks would not be able to learn how many of the 60 grams of total sugar in that beverage²³ were from added sugars, as opposed to the naturally occurring sugars from milk.

¹⁴ Vercammen K, et al. Calorie and Nutrient Profile of Combination Meals at U.S. Fast Food and Fast Casual Restaurants. *American Journal of Preventive Medicine*. 2019; 57(3), e77–e85. <https://doi.org/10.1016/j.amepre.2019.04.008>.

¹⁵ As described *infra*, CSPI assumed all of the sugars in fountain drinks were from added sugars in order to create this report. Center for Science in the Public Interest, 2021.

¹⁶ Malik, V. S., Schulze, M. B., & Hu, F. B. (2006). Intake of sugar-sweetened beverages and weight gain: a systematic review. *The American journal of clinical nutrition*, 84(2), 274–288. <https://doi.org/10.1093/ajcn/84.1.274>

¹⁷ Hu F. B. (2013). Resolved: there is sufficient scientific evidence that decreasing sugar-sweetened beverage consumption will reduce the prevalence of obesity and obesity-related diseases. *Obesity reviews : an official journal of the International Association for the Study of Obesity*, 14(8), 606–619. <https://doi.org/10.1111/obr.12040>

¹⁸ United States Department of Health and Human Services, United States Department of Agriculture. *Dietary Guidelines for Americans, 2020 – 2025*. 9th Ed. Dec. 2020. https://www.dietaryguidelines.gov/sites/default/files/2020-12/Dietary_Guidelines_for_Americans_2020-2025.pdf. Accessed April 6, 2022.

¹⁹ The FDA does not require restaurants to publish ingredients for menu items, as the ACA required publication of calories and nutrition information only.

²⁰ Smoothie King. Pineapple Surf. 2022. <https://www.smoothieking.com/menu/smoothies/break-time- blends/pineapple-surf>. Accessed April 6, 2022.

²¹ Jamba. Aloha Pineapple. 2022. <https://www.jamba.com/smoothies/classic/aloha-pineapple>. Accessed April 6, 2022.

²² Dunkin’. Nutrition Guide. Last updated 12-14-2021. www.dunkindonuts.com/content/dam/dd/pdf/nutrition.pdf. Accessed April 6, 2022.

²³ Starbucks. Caramel Bruleé Latte. 2022. www.starbucks.com/menu/product/517/hot. Accessed April 6, 2022.

Requiring chain restaurants to publish added sugars information creates opportunities for consumers to obtain the information in additional ways. Diet-tracking applications allow consumers to make use of added sugars information aggregated from restaurant chain websites,²⁴ nutrition databases, and user-entered information, allowing consumers to easily track and monitor their own nutrient intake over the course of the day. Consumers also benefit from product reviews and articles that utilize nutrition information to give dietary advice. Yet these applications and resources cannot be populated with added sugars information if the restaurants decline to disclose it, undermining their usefulness for consumers.

III. Nutrition information published by restaurants is necessary and useful for public health research and policy

Publishing added sugars information will improve researchers' ability to conduct analyses on added sugars, filling critical gaps in the public's knowledge. Researchers seeking to assess the nutritional quality of restaurant foods or understand changes over time typically rely on the nutrition information published by restaurants, which are compiled in databases like MenuStat,²⁵ a nutrition database that aggregates chain restaurant nutrition information. When such databases are limited to providing total sugar, this in turn limits the scope of public health research. Requiring added sugars to be disclosed will make it possible for researchers to assess availability and trends with respect to added sugars.

Access to added sugars information can facilitate public health policy initiatives. State and local policymakers must have access to information about the nutritional quality of foods in order to design policies aimed at improving those foods. For example, in December 2021 the New York City Council passed “the Sweet Truth Act” (Int 1326), a bill to require warnings on prepackaged menu items that exceed the daily value for added sugars.²⁶ Yet the policy covers only prepackaged items, which are required to declare added sugars under the 2016 Nutrition Facts rule.²⁷ Requiring added sugars information to be reported for all restaurant items would make it easier for cities and states to design and enforce public health policies aimed at reducing added sugar consumption, by providing added sugars information consistently across the food supply.

IV. Requiring added sugars information would not create an undue burden for restaurants

Chain restaurants have already developed methods for calculating and publishing nutrition information, including total sugars, to comply with the existing menu labeling requirements. Many, if not all, of these chain restaurants make use of nutrition analysis software that has the existing capacity to calculate added sugars, such as the ESHA food processor database.²⁸ The

²⁴ While the FDA does not require nutrition information, other than calories, be published on restaurant websites, many leading chains, publish the same information online that they make available in stores. For example, CSPI visited the website of 20 leading fast food chains for its *Sweet Excess* report, and found that 18 of the chains provided nutrition information online. The two chains that did not, Dairy Queen and Hardee's, also did not provide nutrition information when we contacted multiple individual locations by telephone. Center for Science in the Public Interest, 2021, at Appendix: Methods.

²⁵ MenuStat. 2022. <http://menustat.org/#/home>. Accessed April 6, 2022.

²⁶ Center for Science in the Public Interest. New York City Passes the Sweet Truth Act, Requiring Warnings on Chain Restaurants' Prepackaged Foods and Drinks that are High in Added Sugars. December 15, 2021. <https://www.cspinet.org/news/new-york-city-passes-sweet-truth-act>. Accessed April 6, 2022.

²⁷ *Ibid.*

²⁸ ESHA Research. *Our Customers*. n.d. <https://esha.com/about-us/customers/>. Accessed April 6, 2022.

burden is sufficiently light that some restaurant chains, including Smoothie King,²⁹ Dunkin',³⁰ and Domino's,³¹ have already begun voluntarily publishing grams of added sugars alongside total sugars as part of their nutrition information. Moreover, because chains need to maintain only a single copy of the nutrition information in each establishment, in cases where nutrition facts must be updated, printing expenses will be limited to one document per physical location. Any additional costs associated with a new requirement for added sugars are therefore likely to be negligible for the nation's leading restaurant chains. In addition, the FDA has indicated that it will use its enforcement discretion to allow restaurants to address shortages and other supply chain challenges for the length of the COVID-19 pandemic.³²

V. Conclusion

It is critical that the FDA take action and implement the recommendations of the petition to provide consumers with consistent, transparent, and accessible information about the added sugars in the food and beverages they consume, regardless of whether it is purchased at the grocery store or a chain restaurant. Information about added sugars is critical for individual consumers to be able to follow the DGA guidance on added sugars, and will support efforts to design resources, publications, and policies that improve the health of Americans.

Sincerely,

[Organization]

²⁹ Smoothie King. Nutrition Information. <https://www.smoothieking.com/menu/smoothies/nutrition/fitness-blends>. Accessed April 5, 2022.

³⁰ Dunkin'. Nutrition Guide. Last updated 12-14-2021. www.dunkindonuts.com/content/dam/dd/pdf/nutrition.pdf. Accessed April 6, 2022.

³¹ Domino's. Nutrition Guide. July 2021. https://cache.dominos.com/olo/6_72_2/assets/build/market/US/_en/pdf/DominosNutritionGuide.pdf. Accessed April 6, 2022.

³² <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/temporary-policy-regarding-nutrition-labeling-standard-menu-items-chain-restaurants-and-similar>