

Second California City Issues Ordinance Prohibiting the Provision of Children's-Directed Incentive Items With Food and Beverage Products Failing to Meet Specified Nutritional Criteria

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On November 2, 2010, San Francisco's Board of Supervisors voted 8-3 to approve the "Healthy Food Incentives Ordinance," which would prohibit the provision of toys and other incentive items with children's meals that do not meet specified calorie, sodium, fat, whole grain, and fruit and vegetable content requirements. This legislation follows the May 2010 passage of a [similar ordinance in Santa Clara County, CA](#). The effective date of the San Francisco ordinance is December 1, 2011.

The San Francisco ordinance amends Article 8 of the San Francisco Health Code by adding Section 471.1 through 471.8, to set nutritional standards for restaurant meals sold with toys or other youth-directed "incentive items." The ordinance defines "incentive item" to include:

- any toy, game, trading card, admission ticket or other consumer product, whether physical or digital, with particular appeal to children and teens but not including "single use items" as defined in California Health & Safety Code Section 113914¹; and
- any coupon, voucher ticket token, code or password redeemable for or granting digital or other access to such incentive item.

If the incentive item consists of a food product, the food product will be considered as part of the "meal," for purposes of determining whether the meal meets the nutritional standards of the ordinance. "Meal" is defined as "any single food item or combinations of food items and beverages offered together for a single price," and "includes any beverage offered for the same price."

The ordinance defines restaurant to include any "establishment that stores, prepares, packages, serves, vends, or otherwise prepares food for human consumption at the retail level for consumption on or off premises," including, but not limited to establishments:

- primarily engaged in providing food services to patrons who order and are served while seated, and pay after eating
- primarily engaged in providing food services where patrons generally order or select items and pay before eating, or

- engaged in providing take-out food services where patrons order ready-to-eat food generally intended for immediate consumption off the premises.

Notably, the ordinance covers "separately owned food facilities that are located in a grocery store," but not grocery stores.

Under the ordinance, a restaurant may not provide an incentive item as part of the purchase of a "Meal" that exceeds any of the following nutritional criteria:

	Meal	Beverage (as part of Meal)
Calories	600	n/a
Sodium	640 mg	n/a
Calories from Fat	35% of total calories*	35% of total calories
Calories from Saturated Fat	10% of total calories*	n/a
Trans Fat	.5 g	n/a
Calories from Sugars ("Caloric Sweeteners")	n/a	10% of total calories

*except for contained in nuts, seeds, peanut butter or other nut butters, or an individually served or packaged egg, or individually served or packaged low-fat or reduced fat cheeses

The ordinance also requires that all bread (e.g., a hamburger bun, or sandwich bread) used in a meal served with an incentive item must be made with at least 50 percent whole wheat. In addition, meals with incentive items must include at least 0.5 cups of fruit and 0.5 cups of vegetables, unless the meal is a breakfast meal that consists of food typically considered to be breakfast items. Such breakfast meals must contain at least 0.5 cups of fruit, but do not have a vegetable requirement.

The San Francisco legislation follows the passage of [Santa Clara's May 2010 ordinance](#) prohibiting restaurants from "providing" toys, coupons, or other "incentive items linked to the purchase" of products that failed to meet specific nutrient profiles. The San Francisco legislation differs from the Santa Clara ordinance in that the San Francisco legislation is limited to meals, while the Santa Clara ordinance covers meals, single food items and beverages. In addition, the Santa Clara ordinance includes caffeine limitations, but does not include whole wheat or fruit and vegetable requirements.

Violators of the San Francisco legislation are subject to the fine structure codified in San Francisco Administrative Code Chapter 100, "Procedures Governing the Imposition of Administrative Fines," which provides that the maximum fine for violation of the ordinance is \$100.00 for a first violation of the ordinance, up to \$200.00 for a second violation of the same ordinance within one year of the date of the first violation; and up to \$500.00 for each additional violation of the same ordinance within one year of the date of a second or subsequent violation.

Kelley Drye & Warren LLP

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¹ "Single-use articles" mean utensils, tableware, carry-out utensils, bulk food containers, and other items such as bags, containers, placemats, stirrers, straws, toothpicks, and wrappers that are designed and constructed for one time, one person use, after which they are intended for discard. "Single-use articles" also include items such as wax paper, butcher paper, plastic wrap, formed aluminum food containers, jars, plastic tubs or buckets, bread wrappers, pickle barrels, ketchup bottles, and number 10 cans that do not meet the materials, durability, strength, and cleanability specifications for utensils under Sections 114130, 114130.1, and 114130.3.