

AMENDMENTS AND ADDITIONS REGARDING HEALTH ADVERTISING

On September 8, 2022, the "*Ordinance amending, adding and eliminating several provisions of the Rules of Sanitary Control of Products and Services and the Rules of the General Health Law on Advertising*" was published in the Federal Official Gazette, which entered into force on **September 9, 2022**.

Please note that the **additions and amendments to the Regulation of the General Health Law on Advertising will enter into force 180 calendar days after September 8, 2022.**

This Ordinance seeks to comply, belatedly, with the Second Transitory Article of the "*Decree amending and adding various provisions of the General Health Law, regarding overweight, obesity and labeling of food and non-alcoholic beverages*", published on **November 8, 2019**, which established the duty to make the corresponding regulatory adaptations within 180 days after the date of its publication.

Rules of Sanitary Control of Products and Services

The most relevant changes to these Rules refer to the addition of the definitions "***critical nutrients***", "***portion***", "***prepackaged or packaged***" and "***frontal labeling system***", the latter defined as the information system located on the main display surface, which warns in a truthful, direct, clear, simple and visible manner, when a prepackaged product contains excess energy, critical nutrients and ingredients that represent a health risk in excessive consumption in accordance with the corresponding standard -*Amendment to the Mexican Official Standard NOM-051-SCFI/SSA1-2010, General labeling specifications for prepackaged food and non-alcoholic beverages - Commercial and sanitary information*-.

Furthermore, it is added that products whose components, raw materials, ingredients, and additives, in accordance with the applicable regulations, may represent a risk to human health, must warn of their presence on the label, by means of the necessary precautionary legends. It is also established that the labeling of prepackaged food and non-alcoholic beverages must include the frontal labeling system.

It is also added that the **label** of prepackaged food and non-alcoholic beverages that include one or more elements of the frontal labeling system **may not contain children's characters, animations, cartoons, celebrities, athletes or pets, interactive elements (such as visual**

space games or digital downloads), aimed at children that incite, promote, or encourage their consumption, purchase or selection.

Moreover, it is stated that the Ministry of Health: **(i)** will establish the portions and the unit of measurement for food and non-alcoholic beverages to be taken as reference, in coordination with public and private research and higher education institutions; and **(ii)** will determine the additives, ingredients or substances that at certain levels may generate a health risk, by means of the corresponding official standards.

With respect to prepackaged food and non-alcoholic beverages that may include graphic or textual elements, in accordance with the Federal Consumer Protection Law, indicating that such products have been recommended or recognized by professional organizations or associations, they may only do so when they do not have an excessive content of energy or critical nutrients in accordance with the corresponding standard, specifying the target population and its specific health condition to which it is directed.

Rules of the General Health Law on Advertising

Regarding this Rules, it is added that the advertising of products or services shall not include labels or legends of recommendation or recognition by professional organizations or associations in food and non-alcoholic beverages that include one or more seals of excess energy or critical nutrients.

Further, it is also amended to provide that advertising on food and non-alcoholic beverages, when the label of such products includes the frontal labeling system, will be subject to a permit granted through the Federal Commission for the Protection against Health Risks - *Comisión Federal para la Protección contra Riesgos Sanitarios*-, which will establish the advertising requirements and procedures that must be complied with on advertising and the conditions for granting the corresponding permit.

It is also added that the **advertising** of prepackaged food and non-alcoholic beverages that include one or more elements of the frontal labeling system, in accordance with the corresponding standard, **may not include children's characters, animations, cartoons, celebrities, athletes or pets, interactive elements (such as visual space games or digital downloads), aimed at children that incite, promote or encourage their consumption, purchase or selection.**

Although the Ordinance seeks to harmonize the Rules of Sanitary Control of Products and Services and the Rules of the General Health Law on Advertising, with the General Health Law and the previous *Amendment to the Mexican Official Standard NOM-051-SCFI/SSA1-2010, General labeling specifications for prepackaged food and non-alcoholic beverages-Commercial and sanitary information-*, published on March 27, 2020, once again we are faced with several fundamental questions/criticisms:

1.- In connection with the prohibition to include in the labeling and advertising of prepackaged food and non-alcoholic beverages that include one or more elements of the frontal labeling system, children's characters, animations, cartoons, celebrities, athletes or pets, interactive elements (such as visual spatial games or digital downloads), aimed at children that incite, promote or encourage their consumption, purchase or selection, **it results in a criteria that could be considered subjective, since there are no clear guidelines or criteria that determine what is understood by "inciting, promoting or encouraging their consumption, purchase or selection", which would also hinder the possibility of initiating infringement proceedings since uncertainty prevails as to how to prove such conducts.**

The foregoing, considering the *principle of typicality* –“*principio de tipicidad*”- in administrative sanctioning law, understood as the intelligible predetermination of the sanctioned conduct, in a precise manner, allowing people the predictability of infringing conducts; that is, to know clearly and in advance, what conduct entails an infringement of the applicable provision and avoiding the arbitrariness of the authority. In this sense, the prohibition of the Ordinance leaves an ambiguity that would difficult its implementation.

2.- Furthermore, there are arguments to raise the unconstitutionality of certain aspects of the Ordinance, such as the prohibition indicated in the previous item, as it contravenes the *principle of the reservation of law* –“*principio de reserva de ley*”-, since this principle dictates that a regulation cannot introduce a liability/prohibition that is not provided for in the corresponding law, as it is hierarchically inferior.

Likewise, it could result in contravention of several international treaties subscribed by Mexico, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights and the Treaty between the United States of America, Mexico and Canada, from which it follows and could be argued that: **(a)** any health measure adopted must respect and be in accordance with said treaties, without violating intellectual property rights; **(b)** the prohibitions included in the Ordinance impede the due use of marks of products or services in certain classes, violating industrial property rights; and **(c)** health measures must not create unnecessary obstacles to trade, which would clearly occur by virtue of the new prohibitions.

3. There remains the issue of the *proportionality* (and therefore the constitutionality) of this measure, according to which it seems that the use of these children's characters, animations, cartoons, celebrities, athletes or pets, interactive elements that in most cases constitute (or constituted) registered marks, distinctive signs or copyrights, with very high value, is absolutely prohibited, in contrast with the unproven (and very doubtful) efficiency of the measure from a sanitary perspective.

In case you require additional information on this matter, please do not hesitate to contact us.
