

115TH CONGRESS
2D SESSION

H. R. 772

IN THE SENATE OF THE UNITED STATES

FEBRUARY 7, 2018

Received

AN ACT

To amend the Federal Food, Drug, and Cosmetic Act to improve and clarify certain disclosure requirements for restaurants and similar retail food establishments, and to amend the authority to bring proceedings under section 403A.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Common Sense Nutri-
3 tion Disclosure Act of 2017”.

4 **SEC. 2. AMENDING CERTAIN DISCLOSURE REQUIREMENTS**
5 **FOR RESTAURANTS AND SIMILAR RETAIL**
6 **FOOD ESTABLISHMENTS.**

7 (a) IN GENERAL.—Section 403(q)(5)(H) of the Fed-
8 eral Food, Drug, and Cosmetic Act (21 U.S.C.
9 343(q)(5)(H)) is amended—

10 (1) in subclause (ii)—

11 (A) in item (I)(aa), by striking “the num-
12 ber of calories contained in the standard menu
13 item, as usually prepared and offered for sale”
14 and inserting “the number of calories contained
15 in the whole standard menu item, or the num-
16 ber of servings (as reasonably determined by
17 the restaurant or similar retail food establish-
18 ment) and number of calories per serving, or
19 the number of calories per the common unit di-
20 vision of the standard menu item, such as for
21 a multiserving item that is typically divided be-
22 fore presentation to the consumer”;

23 (B) in item (II)(aa), by striking “the num-
24 ber of calories contained in the standard menu
25 item, as usually prepared and offered for sale”
26 and inserting “the number of calories contained

1 in the whole standard menu item, or the num-
2 ber of servings (as reasonably determined by
3 the restaurant or similar retail food establish-
4 ment) and number of calories per serving, or
5 the number of calories per the common unit di-
6 vision of the standard menu item, such as for
7 a multiserving item that is typically divided be-
8 fore presentation to the consumer”; and

9 (C) by adding at the end the following
10 flush text:

11 “In the case of restaurants or similar retail food es-
12 tablishments where the majority of orders are placed
13 by customers who are off-premises at the time such
14 order is placed, the information required to be dis-
15 closed under items (I) through (IV) may be provided
16 by a remote-access menu (such as a menu available
17 on the internet) as the sole method of disclosure in-
18 stead of on-premises writings.”;

19 (2) in subclause (iii)—

20 (A) by inserting “either” after “a res-
21 taurant or similar retail food establishment
22 shall”; and

23 (B) by inserting “or comply with subclause
24 (ii)” after “per serving”;

25 (3) in subclause (iv)—

1 (A) by striking “For the purposes of this
2 clause” and inserting the following:

3 “(I) IN GENERAL.—For the purposes of
4 this clause”;

5 (B) by striking “and other reasonable
6 means” and inserting “or other reasonable
7 means”; and

8 (C) by adding at the end the following:

9 “(II) PERMISSIBLE VARIATION.—If the
10 restaurant or similar food establishment uses
11 such means as the basis for its nutrient content
12 disclosures, such disclosures shall be treated as
13 having a reasonable basis even if such disclo-
14 sures vary from actual nutrient content, includ-
15 ing but not limited to variations in serving size,
16 inadvertent human error in formulation or
17 preparation of menu items, variations in ingre-
18 dients, or other reasonable variations.”;

19 (4) by amending subclause (v) to read as fol-
20 lows:

21 “(v) MENU VARIABILITY AND COMBINATION
22 MEALS.—The Secretary shall establish by regulation
23 standards for determining and disclosing the nutri-
24 ent content for standard menu items that come in
25 different flavors, varieties, or combinations, but

1 which are listed as a single menu item, such as soft
2 drinks, ice cream, pizza, doughnuts, or children’s
3 combination meals. Such standards shall allow a res-
4 taurant or similar retail food establishment to
5 choose whether to determine and disclose such con-
6 tent for the whole standard menu item, for a serving
7 or common unit division thereof, or for a serving or
8 common unit division thereof accompanied by the
9 number of servings or common unit divisions in the
10 whole standard menu item. Such standards shall
11 allow a restaurant or similar retail food establish-
12 ment to determine and disclose such content by
13 using any of the following methods: ranges, aver-
14 ages, individual labeling of flavors or components, or
15 labeling of one preset standard build. In addition to
16 such methods, the Secretary may allow the use of
17 other methods, to be determined by the Secretary,
18 for which there is a reasonable basis (as such term
19 is defined in subclause (iv)(II)).”;

20 (5) in subclause (x)—

21 (A) by striking “Not later than 1 year
22 after the date of enactment of this clause, the
23 Secretary shall promulgate proposed regulations
24 to carry out this clause.” and inserting “Not
25 later than 1 year after the date of enactment of

1 the Common Sense Nutrition Disclosure Act of
2 2017, the Secretary shall issue proposed regula-
3 tions to carry out this clause, as amended by
4 such Act. Final regulations to carry out this
5 clause, including any regulations promulgated
6 before the date of enactment of the Common
7 Sense Nutrition Disclosure Act of 2017, shall
8 not take effect until such compliance date as
9 shall be specified by the Secretary in the regu-
10 lations promulgated pursuant to the Common
11 Sense Nutrition Disclosure Act of 2017.”; and

12 (B) by adding at the end the following:

13 “(IV) CERTIFICATIONS.—Restaurants and
14 similar retail food establishments shall not be
15 required to provide certifications or similar
16 signed statements relating to compliance with
17 the requirements of this clause.”;

18 (6) by amending subclause (xi) to read as fol-
19 lows:

20 “(xi) DEFINITIONS.—In this clause:

21 “(I) MENU; MENU BOARD.—The term
22 ‘menu’ or ‘menu board’ means the one listing of
23 items which the restaurant or similar retail food
24 establishment reasonably believes to be, and
25 designates as, the primary listing from which

1 customers make a selection in placing an order.
2 The ability to order from an advertisement,
3 coupon, flyer, window display, packaging, social
4 media, or other similar writing does not make
5 the writing a menu or menu board.

6 “(II) PRESET STANDARD BUILD.—The
7 term ‘preset standard build’ means the finished
8 version of a menu item most commonly ordered
9 by consumers.

10 “(III) STANDARD MENU ITEM.—The term
11 ‘standard menu item’ means a food item of the
12 type described in subclause (i) or (ii) of sub-
13 paragraph (5)(A) with the same recipe prepared
14 in substantially the same way with substantially
15 the same food components that—

16 “(aa) is routinely included on a menu
17 or menu board or routinely offered as a
18 self-service food or food on display at 20 or
19 more locations doing business under the
20 same name; and

21 “(bb) is not a food referenced in sub-
22 clause (vii).”; and

23 (7) by adding at the end the following:

24 “(xii) OPPORTUNITY TO CORRECT VIOLA-
25 TIONS.—Any restaurant or similar retail food estab-

1 lishment that the Secretary determines is in viola-
 2 tion of this clause shall have 90 days after receiving
 3 notification of the violation to correct the violation.
 4 The Secretary shall take no enforcement action, in-
 5 cluding the issuance of any public letter, for viola-
 6 tions that are corrected within such 90-day period.”.

7 (b) NATIONAL UNIFORMITY.—Section 403A(b) of the
 8 Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343–
 9 1(b)) is amended by striking “may exempt from sub-
 10 section (a)” and inserting “may exempt from subsection
 11 (a) (other than subsection (a)(4))”.

12 **SEC. 3. LIMITATION ON LIABILITY FOR DAMAGES ARISING**
 13 **FROM NONCOMPLIANCE WITH NUTRITION**
 14 **LABELING REQUIREMENTS.**

15 Section 403(q)(5)(H) of the Federal Food, Drug, and
 16 Cosmetic Act (21 U.S.C. 343(q)(5)(H)), as amended by
 17 section 2, is further amended by adding at the end the
 18 following:

19 “(xiii) LIMITATION ON LIABILITY.—A res-
 20 taurant or similar retail food establishment shall not
 21 be liable in any civil action in Federal or State court
 22 (other than an action brought by the United States
 23 or a State) for any claims arising out of an alleged
 24 violation of—

25 “(I) this clause; or

1 “(II) any State law permitted under sec-
2 tion 403A(a)(4).”.

Passed the House of Representatives February 6,
2018.

Attest:

KAREN L. HAAS,

Clerk.