

CHAIRMAN

RANKING MEMBER

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

MEMORANDUM

June 2, 2015

To: Subcommittee on Health Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on “Examining H.R. 2017, the Common Sense Nutrition Disclosure Act of 2015.”

On Thursday, June 4, 2015, at 10:00 am in 2123 Rayburn House Office Building, the Subcommittee on Health of the Committee on Energy and Commerce will hold a hearing entitled “Examining H.R. 2017, the Common Sense Nutrition Disclosure Act of 2015.”

I. BACKGROUND

In recent years, menu labeling has emerged as one way to address the rising rates of obesity and diet-related chronic diseases in the United States. More than two-thirds of adults and about a third of children are considered to be overweight or obese in the United States.¹ While many factors that can lead to weight gain, overconsumption of calories is considered to be one of the primary causes. Today Americans spend nearly half of their food dollars on foods prepared outside the home, and research has found that the majority of consumers do not know or underestimate the calorie content of their meals.² Access to nutrition information at point of purchase is thought to be one way to help consumers to make more informed choices, resulting in many states and localities adopting menu labeling requirements for restaurants.

¹ National Institute of Diabetes and Digestive and Kidney Diseases, *Overweight and Obesity Statistics*, (online at <http://www.niddk.nih.gov/health-information/health-statistics/Pages/overweight-obesity-statistics.aspx>).

² Jason P. Block et al., *Consumers’ Estimation of Calorie Content at Fast Food Restaurants: Cross Sectional Observational Study*, British Medical Journal 346, (2013):f2907.

Since 2006 more than 20 states or localities have adopted menu labeling requirements, with New York City, California, and King County, Washington being early adopters.³ Early studies regarding implementation of menu labeling requirements at the state or local level suggest that it may help to increase consumer awareness regarding nutritional information, and reduce calories purchased. Following implementation of menu labeling requirements in New York, 64 percent of customers reported seeing calorie information, and among those who saw the calorie information, the number of customers who used the information in making their purchase choice doubled.⁴ A study conducted in King County, Washington, 18 months after implementation of menu labeling requirements, found that one-third of customers reported using calorie information to make their purchase choice, and amongst this group the average calories per purchase decreased by 143 calories.⁵

The inclusion of nutrition information on restaurant menus has support from the majority of U.S. consumers, with 68 percent supporting the government requiring restaurants to post calorie information at the point of purchase.⁶ National menu labeling requirements have also enjoyed broad support amongst public health, health professional, and industry groups, including the American Heart Association, the American Medical Association, Association of State and Territorial Health Officials, National Association of County and City Health Officials, and the National Restaurant Association.

II. FDA AUTHORITY AND REGULATORY ACTION

A. Background on FDA Authority's Over Nutrition Labeling

³ New York City's regulation, implemented in 2008, requires restaurants with 15 or more locations nationally to display calorie content. California's menu labeling law, also enacted in 2008, requires restaurants with 20 or more locations in California to post calorie content, carbohydrates, saturated fat, trans fat, and sodium content. King County, Washington, which implemented a menu labeling regulation in 2009, requires restaurants with 15 or more locations nationally to display calorie content, and provide saturated fat, carbohydrate, and sodium information at the point of ordering.

⁴ Tamara Dumanovsky et al., Consumer Awareness of Fast-Food Calorie Information in New York City After Implementation of a Menu Labeling Regulation, *American Journal of Public Health* 100, no.12. (2010):2520–2525.

⁵ Consumers Underestimate Calories in Fast-Food Meals; Teens Do So By as Much as 34 Percent, Healthy Eating Research Program at the Robert Wood Johnson Foundation (May 23, 2013)(online at http://www.rwjf.org/en/library/articles-and-news/2013/05/consumers-underestimate-calories-in-fast-food-meals-teens-do-so.html?cq_ck=1369345742890).

⁶ Sara N. Bleich and Keshia M. Pollack, *The Publics' Understanding of Daily Caloric Recommendations and Their Perceptions of Calorie Posting in Chain Restaurants*, *BMC Public Health*, (2010): 10:121.

The Nutrition Labeling and Education Act of 1990 authorized the Food and Drug Administration (FDA) to require nutrition labeling for many foods, but exempted restaurants and other retail food establishments that offer food for immediate consumption or foods primarily processed and prepared for human consumption.

The Affordable Care Act (ACA), signed into law in 2010, included a provision (Section 4205) that would address this gap in federal nutrition labeling requirements, mandating national nutrition labeling for standard menu items in restaurants and retail food establishments with 20 or more locations, doing business under the same name, and offering the same menu items.⁷ Covered establishments must disclose on the menu and menu board for standard menu items the number of calories contained in the item, as well as a succinct statement regarding the suggested daily calorie intake. Establishments must also make available, upon consumer request, written information about certain nutrition information, and have a “reasonable basis” for its nutrient information disclosures, such as nutrient databases, cookbooks, or laboratory analyses. Importantly, the menu labeling requirements included in the ACA preempted states and localities from establishing or continuing any menu labeling requirements that are not identical to the federal requirements for food sold in restaurants and covered retail food establishments. Given the variability between state and local requirements, the restaurant industry was one of the leading supporters for a national policy, and advocated for its inclusion in the ACA.

B. Regulatory Action by FDA

FDA was required to promulgate regulations to carry out the requirements of Section 4205 of the ACA, including establishing standards for determining and disclosing nutrition information for standard menu items and variable menu items; any other nutrient that may be disclosed upon request to consumers; registration requirements for establishments that want to voluntarily provide nutrition information; and the format and manner of the nutrition information disclosure requirement. FDA was directed to take into consideration the following factors when promulgating these regulations: the standardization of recipes and methods of preparation; variation in serving size and formulation of menu items; variation in ingredients; space on menus and menu boards; inadvertent human error; training of food service workers; and other factors as determined by FDA.

In April 2011, FDA published the proposed menu labeling rule. The proposed rule, which garnered over 1,100 comments, defined terms in the law, outlined requirements for covered establishments and how establishments not covered by the menu labeling requirements could voluntarily register, and set the effective date for implementation. The most debated provisions of the proposed rule were the definition of “restaurants or similar retail food establishment,” types of foods covered under the law, and the definition of “menus” and “menu boards.”

The initial rule proposed two options for defining “restaurants or similar retail food establishment” and invited comment on these two options. Under option one, an establishment

⁷ The Affordable Care Act, Section 4205, Nutrition Labeling of Restaurant Menus and Food Sold in Vending Machines, (online at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>).

would be covered if a total of more than 50 percent of a retail establishment's gross floor space was used for the preparation, purchase, service, consumption, or storage of food, or 50 percent of the establishment's revenues are derived from food. Alternatively, under option two, an establishment would be covered if a total of more than 50 percent of a retail establishment's gross floor area was used for the preparation, purchase, service, consumption, or storage of restaurant or restaurant-type food or its ingredients. Both options would have generally exempted movie theaters, amusement parks, and concession stands, however, option two would have also exempted grocery and convenience stores.

Grocery stores and convenience stores expressed strong concerns about the burden and expense of implementing menu labeling, as these establishments had not generally been covered by existing state and local requirements. However, the original sponsors of the provision included in ACA, Congresswoman Rosa DeLauro (D-CT) and former Senator Tom Harkin (D-IA), noted that it was their intent for the law to apply "broadly to restaurants as well as other retail food establishments that sell food to consumers, regardless of the percentage of floor space devoted to food and regardless of whether the food sales constitute a large or small portion of the establishments' total business."⁸ The legislation's sponsors noted it was the intent of Congress for the scope of the law to extend beyond restaurants and also include movie theaters, bowling alleys, bookstore cafes, and other like establishments.

Concerns were also raised about the types of food covered under the proposed rule and the definition of "primary writing" for purposes of menu and menu boards. The proposed rule would have covered restaurant food, food for immediate human consumption, or restaurant-type food, food processed and prepared in a retail establishment for sale to consumers but not for immediate consumption. This would include combination meals, variable menu items, and self-service food, but would have exempted food on display, daily specials or temporary menu items, custom orders, and customary market test-foods. Concerns were raised by the grocery industry in regard to restaurant-type food available through their stores, such as prepared sandwiches or meals, being covered given the variability in preparation and availability. The pizza industry also raised separate concerns about the industry's ability to comply with menu labeling requirements for variable menu items, such as pizzas, given the wide variety of combinations. Stakeholders expressed some concern with the proposed rule's interpretation of primary writing. FDA proposed that "primary writing" be the written material used by a consumer for making a food order. Under the proposed rule, this could include drive-through menus, take-out menus, Internet menus, pamphlets, and in-store menus. Those concerned with this interpretation argued that there would be a burden for providing such information in multiple materials, and also did not take into account the unique ordering needs of the different retail food establishments.

⁸ Letter from Representative Rosa DeLauro and former Senator Tom Harkin to The Honorable Shaun Donovan, Director of the Office of Management and Budget, August 15, 2014, (online at <http://www.help.senate.gov/ranking/newsroom/press/harkin-delauro-call-on-administration-to-issue-strong-menu-labeling-rule>).

The final menu labeling rule was released by FDA on December 1, 2014.⁹ The final rule included a number of changes meant to address concerns raised by certain industries. A covered establishment under the final rule is a restaurant or other similar retail food establishment that must be part of a chain of 20 or more locations, doing business under the same name, and offering for sale substantially the same menu items. Establishments that meet this criteria include restaurants that are quick service or sit-down, food take-out facilities, pizza delivery establishments, food facilities in entertainment venues (such as movie theaters and bowling alleys), cafeterias, coffee shops, superstores, grocery and convenience stores, among others.¹⁰ Foods purchased at a grocery store or other similar retail food establishment that are typically intended for more than one person to eat, such as a whole cake or large-size deli items, and require additional preparation before consuming, such as deli meats and cheeses, are not covered. Flexibility was also provided in the final rule for multi-serving dishes like pizza, allowing these food items to be labeled by the slice rather than the whole pie, and to allow covered establishments to list a range of calories to account for different toppings.

The final rule also specified the succinct statement on suggested daily calorie intake to be posted and identified the required nutrition information that should be made available upon consumer request. Nutrition information that must be made available in writing upon request by a consumer includes: fat, cholesterol, sodium, total carbohydrates, fiber, sugars, and protein. FDA also extended the effective date in the final rule from six months to one year, requiring restaurants and similar retail food establishments to be in compliance by December 1, 2015.

III. LEGISLATION AND CONGRESSIONAL ACTION

Introduced by Reps. Cathy McMorris Rodgers (R-WA05) and Loretta Sanchez (D-CA46), H.R. 2017, the “Common Sense Nutrition Disclosure Act of 2015” would make changes to the final rule promulgated by FDA to clarify certain disclosure requirements for restaurants and similar retail food establishments.

One of the most significant changes would be to limit the menu labeling requirements to establishments that derive 50 percent or more of their total revenue from the sale of food for immediate consumption or prepared and processed on site. This clarification would have the practical effect of exempting some retail food establishments, including some grocery stores and convenience stores. Further, the legislation would allow restaurants and similar retail food

⁹ FDA, *Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Calorie Labeling of Articles of Food in Vending Machines; Final Rule*, (December 1, 2014) (online at <https://www.federalregister.gov/articles/2014/12/01/2014-27833/food-labeling-nutrition-labeling-of-standard-menu-items-in-restaurants-and-similar-retail-food>).

¹⁰ FDA, *Questions and Answers on the Menu and Vending Machines Nutrition Labeling Requirements* (online at <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm248731.htm>). (School cafeterias serving food through the USDA school lunch and breakfast programs, and transportation vehicles (such as airplanes or trains) are not considered covered establishments.

establishments that meet the above definition to choose which approach to provide calorie information, including for the whole product, for the number of servings and number of calories per serving, or the number of calories per the common unit of division of a standard menu item that is multiserving (e.g. a slice of a pizza from a whole pizza, or a piece of cake from a whole cake).

The legislation would also define “menu” or “menu board” as the one listing of items which the restaurant or similar retail food establishment believes to be, or designates as, the primary listing from which customers make a selection in placing an order; further, it clarifies that the ability to order from an advertisement, coupon, flyer, window display, packaging, social media, or other similar writing does not make the writing a menu or menu board. This would allow restaurants and retail food establishments to identify a single primary menu to include calorie labeling, and exclude such information from any additional written materials. The legislation would also allow establishments where the majority of orders are placed by customers off-premises, such as those that offer delivery service, to provide calorie information on a remote-access menu such as through a website, instead of an on-site menu.

Additionally, H.R. 2017 would define “standard menu item” to mean an item with the same recipe prepared in substantially the same way, with substantially the same food components that are routinely included on a menu or menu board or are routinely offered as a self-service food or food on display at 20 or more locations doing business under the same name. Restaurants and retail food establishments would also be allowed to provide calorie information for variable menu items – those that come in different flavors, varieties, or combinations, but are listed as a single menu item (such as ice cream, pizza, or doughnuts) – in ranges, averages, individual labeling of flavors or components, or labeling of a present standard build (the version of a menu item most commonly ordered by consumers).

Finally, the legislation would remove the requirement that restaurants and retail food establishments certify that the information provided for the standard menu item adhere to the factors on which its nutrient values were determined. It would also provide establishments in violation of the menu labeling requirements 90 days to correct the violation before the Secretary could take any enforcement action, and would limit suits brought against establishments to the federal government and the states.

Members in the House and Senate have recently written to the FDA to request a one-year delay of implementation of the final rule noting that there is a need for additional guidance from the agency to help covered establishments to comply with the final rule.¹¹

¹¹ Letter from 32 Senators to the FDA Acting Commissioner Stephen Ostroff, M.D. (May 28, 2015)(online at <http://www.help.senate.gov/chair/newsroom/press/32-senators-urge-fda-to-provide-clarity-to-businesses-before-enforcing-menu-labeling-rule>); Letter from Reps. Loebsack (D-IA), Welch (D-VT), Kilmer (D-WA), Ruppertsberger (D-MD), and Schrader (D-OR) to FDA Acting Commissioner Ostroff (May 27, 2015).

IV. WITNESSES

Sonja Yates Hubbard

Chief Executive Officer

E-Z Mart Stores, Inc.

On behalf of the National Association of Convenience Stores

Israel O'Quinn

Director of Strategic Initiatives

Food City

On behalf of the Food Marketing Institute

Lynn Liddle

Chairperson

American Pizza Community

Karen Raskopf

Chief Communications Officer

Dunkin' Brands, Inc.

Margo G. Wootan, D.Sc.

Director, Nutrition Policy

Center for Science in the Public Interest