



Statement Of

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On behalf of the

**National Association of Convenience Stores
(NACS)**

Before the

**U.S. House of Representatives
Committee on
Energy and Commerce,
Subcommittee on Health
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**Hearing Examining H.R. 2017, the
Common Sense Nutrition Disclosure Act**

SUMMARY OF TESTIMONY

1. The convenience store industry strongly supports H.R. 2017 and efforts to provide consumers the nutrition information they want. Indeed, most of the food products we sell today already include such information. The industry simply wants to be able to provide this information in ways that are practical for our businesses and useful for our customers.

2. The Food and Drug Administration's menu labeling regulations have serious flaws and appear to have been designed for chain restaurants rather than the wide variety of formats in which food is sold. Convenience stores' model for acquiring, preparing, and selling food to consumers, for example, differs greatly from chain restaurants' model. The regulations also will subject retailers to potentially harsh penalties even if retailers undertake good-faith efforts to comply. Unless the regulations are revised, consumers' access to a wide variety of affordable food options may be limited.

3. H.R. 2017 would help solve these problems: It contains provisions that would minimize unnecessary compliance burdens – without compromising consumers' ability to receive nutrition information – while also revising the enforcement regime to ensure that the regulations are not unreasonably punitive.

4. H.R. 2017 is sound legislation for food retailers and, more importantly, the consumers that they serve.

INTRODUCTION

Chairman Pitts, Ranking Member Green, Members of the Subcommittee, thank you for the opportunity to testify today. My name is Sonja Hubbard. I am the CEO of E-Z Mart Stores headquartered in Texarkana, Texas.¹ I am testifying today on behalf of the National Association of Convenience Stores (NACS).² More than 60% of NACS's members operate a single store. Many of these single store owners operate under the name of a major oil company or as franchisees of larger companies and thus are covered by the menu labeling requirements that are the subject of today's hearing.

The convenience store industry supports H.R. 2017, the Common Sense Nutrition Disclosure Act, and efforts to provide customers the nutrition information they want. Indeed, most of the food sold in convenience stores is prepackaged and already contains such information. Should H.R. 2017 pass, consumers would receive more nutrition information than they do today and they would receive it in a way that is more useful to them and less burdensome to businesses than under the regulatory regime currently in place.

The Food and Drug Administration's ("FDA's") final menu labeling rules have serious flaws and appear to have been designed for chain restaurants. But food is sold in many different ways across the United States. Some stores have menus, some do not. There are a wide variety of self-serve food options in U.S. stores. There are also a wide variety of stores that allow consumers to make their own foods or order them in custom ways. And the stores look very different – from convenience stores to grocery stores to food trucks. The FDA's regulations simply do not fit these many different formats. Unless the regulations are revised, some businesses may be forced to curtail some of their most innovative offerings and consumers' access to a wide variety of affordable food options will be limited.

In my industry, for example, convenience stores are increasingly selling fresh and prepared food offerings to consumers. The FDA's menu labeling regulations recognize this fact. However, the manner in which convenience stores acquire, prepare, and offer for sale fresh and prepared food differs greatly from how chain restaurants do so. The FDA's final rule exhibits very little understanding of this reality.

H.R. 2017 would rectify this by providing retailers greater flexibility to comply with federal menu labeling requirements in a manner that minimizes unnecessary compliance burdens without compromising consumers' ability to receive nutrition

¹ E-Z MART, Inc. owns and operates a chain of convenience stores and gasoline stations in Arkansas, Louisiana, Oklahoma, and Texas. The company began with one store and now operates nearly 300. We proudly remain family owned and operated. We do not consider ourselves to be the only family in the business, however. E-Z Mart employs more than 2,100 people, many long-tenured and passionate about the company, and all are considered part of the E-Z Mart Family.

² NACS is an international trade association composed of more than 2,200 retail member companies and more than 1,600 supplier companies doing business in nearly 50 countries. Total industry sales in 2013 were approximately \$700 billion.

information. The bill would also revise the menu labeling rule's enforcement regime to strike an appropriate balance between any noncompliance and potential punishment. These provisions will avoid the prospect of local store managers being charged with felonies for accidentally violating menu labeling regulations, while at the same time fostering a cooperative public-private partnership to ensure that food retailers are able to provide consumers the information that consumers want in a practical, reasonable manner.

In the testimony that follows, I will provide a brief overview of the convenience store industry's model for providing food to our customers and illustrate how this model differs from that of chain restaurants. I will also address how the FDA's menu labeling regulations do not account for these differences, and discuss H.R. 2017's approach to bridging this gap and creating a regulatory regime that accommodates a variety of models for providing food to consumers.

CONVENIENCE STORES VS. CHAIN RESTAURANTS

As a general matter, quick-service restaurants and sit-down chain restaurants sell the same food offerings, prepared in the same way, and displayed on the same menu, at all of their respective locations. This model lends itself to a relatively simple menu labeling regulatory structure: place calorie counts next to every item on the menu or menu board. It is easy and inexpensive for restaurants to comply, and straightforward for FDA to enforce.

The convenience store industry is different. Stores within a chain do not have identical product offerings. Indeed, stores vary greatly – even those that are part of the same chain – based largely on their location and the market demands in a particular area. What's more, even stores that do sell the same items as one another may *offer* those items in different ways. For example, some store locations may have a self-serve station for customers to get a slice of pizza, while others might offer to make those pizzas with different toppings based on a customer's individual order. This and other variations make menu labeling compliance far more complicated.

By way of example, E-Z Mart stores offer a variety of different fresh and prepared food offerings. In the morning, most of our stores (but not all of them) offer breakfast options, such as sausage, egg, and cheese biscuits. These products are not all prepared in the same manner using the same ingredients – E-Z Mart has more than fifty different suppliers serving different store locations, and those suppliers' products have different calorie counts. What's more, some of our stores offer these products on a self-serve basis, while other stores require customers to ask a store employee for the item. Some stores list these products on a menu board while others do not. These complexities all trigger different obligations under the menu labeling law.

Similarly, in the afternoon and evenings, E-Z Mart offers a variety of chicken offerings to our consumers. Some stores offer fried chicken, others have baked chicken; some stores offer chicken tenders, while others offer chicken strips. All of these items

have different amounts of calories. Thus, unlike chain restaurants, we cannot develop a centralized compliance plan that can be uniformly adopted by all of our stores; instead, we need to analyze our stores on a location-by-location basis and develop more individualized compliance plans. This requires a great deal of time and resources.

In addition, our product offerings are constantly evolving. At any given time, we are testing 15-20 new products. Some stores will find that a product sells well and make that product a permanent item; others will find that a product does not sell and will stop offering the product. Responding to our customers' demands in this way injects a level of complexity into our compliance obligations that chain restaurants, due to the nature of their business model, will generally not be forced to endure.

Another important way that convenience stores differ from many chain restaurants is that our food offerings are often designed to enable customers to tailor food items to their own liking. For example, a menu board at a convenience store might offer a "turkey sandwich," and leave it to the customer to add various additional sauces, cheeses, bread, and the like to their meal. Under FDA's rule, stores will have to list a very wide range of calories a customer could consume by ordering such a "variable menu item" – from a plain "meat and bread" sandwich to a sandwich with "the works." Such a range is difficult for establishments to calculate – particularly for items such as pizza that could have hundreds or even thousands of potential combinations – and of little utility to the public.

Convenience stores offer food in many different settings. In our stores, we have food displayed at the counter area, self-serve coffee stations, self-serve soda stations, baked goods displayed away from the counter area, refrigerated foods that customers can "grab-and-go," and most of these foods and beverages are not even listed on the menu boards that sometimes appear above the counter. And we are just one chain of stores. The variations in the industry are even more numerous. But, just in our stores alone, we often have five or more different areas of the store that would have to be populated with a multiplicity of different calorie signs to meet the FDA's regulations. Displaying and maintaining dozens of calorie signs with hundreds of calorie counts in places all throughout the store will be a herculean task. Customers will knock them over, the signs will obscure other informational signage within our stores, and the signs will have to be constantly updated and changed-out to keep up with changing offerings. That makes us very different.

A final example of the menu labeling rule's incompatibility with convenience stores' business model is the calorie-labeling requirements for self-serve beverage machines. All E-Z Mart stores have soda fountains that enable customers to fill their own cups with a single – or a combination of – soft drink(s). Under the rules, for every cup size available to a consumer (*e.g.*, small, medium, large, extra large), we must declare the calorie information for *every soft drink* available in the machine. By way of example, if we have four cup sizes available and ten different beverage options in a soda fountain, we

will need to include the calorie information for forty different items.³ What's more, different E-Z Mart stores offer different types of beverages, which means that we will need to create dozens of different signs that include this information depending upon the beverages offered at each store. This is an unreasonable compliance obligation, and in the end it will not provide consumers with meaningful information.

FDA'S FINAL RULE AND HOW H.R. 2017 WOULD HELP

H.R. 2017 will help convenience stores and their customers by making reasonable changes to the law and its current regulations. These changes generally fall into two categories: simplifying covered establishments' obligations and revising the enforcement regime.

Simplifying Covered Establishments' Obligations

One Menu Per Store

The menu labeling provisions in the healthcare reform law requires covered establishments to include calorie information on the "primary writing" from which a consumer makes an order selection. It is clear that Congress intended establishments to identify a *single* "primary" menu in the store and include information on that menu. Thus, Congress rightly concluded that consumers would have easy access to calorie information if such information were included on an establishment's "primary" menu or menu board.

FDA has interpreted this provision, however, to require convenience stores to include calorie information on virtually any writing in a store that a customer could see when making a food ordering decision. Because convenience stores sell food in so many different areas within a store, they will be required to create dozens of "menus" to accommodate the mandatory calorie declarations. This requirement is particularly problematic when it comes to advertisements. Under the FDA's rule, it is far less clear than it should be that advertisements and posters are not covered by the menu labeling rule. And, it is very difficult to determine what is an advertisement and what is a "menu."

H.R. 2017 will renew Congress's original intent by requiring covered establishments to identify their primary menu or menu board, and comply with the menu labeling requirements on that menu. It further clarifies that advertisements do not need to include calorie declarations. This will provide customers easy access to nutrition

³ Although the rule does allow "grouping" items with similar caloric contents and listing those items as a single item, the way that this "flexibility" is structured will be far less helpful than FDA appears to believe. Specifically, only items that have a caloric content identical to another item – after rounding to the nearest 10-calorie increment – may be grouped together. Thus, if a small Coke has 85 calories, and a small Dr. Pepper has 84 calories, those two items could not be grouped together (because Coke will need to be displayed as 90 calories and Dr. Pepper will need to be displayed as 80 calories). See 21 C.F.R. 101.11(b)(2)(i)(A)(4)(i) (allowing group for items with similar caloric contents); see also 21 C.F.R. 101.11(b)(2)(i)(A)(2) (outlining the requirements for rounding).

information without imposing unreasonable and duplicative obligations on small business owners.

Labeling Flexibility

FDA's final rule contains rigid calorie labeling requirements that often result in consumers' receiving no helpful information (for example, disclosing that an item has between 200 and 1,800 calories).

H.R. 2017 would provide establishments flexibility in disclosing the caloric information for variable menu items that come in different flavors or varieties (*e.g.*, sandwiches, pizza, soft drinks, etc.) or combination meals (*e.g.*, "Meal #1" being a sandwich with chips or carrots and a beverage). Specifically, the legislation would permit establishments to provide the information through any of the following methods:

- Ranges;
- Averages;
- "Standard" offerings (*e.g.*, the information for an "Italian sandwich" without regard to whether the customer orders extra cheese or sauce);
- The number of servings and the number of calories per serving; or
- Individual labeling of flavors or components of the item.

Food Items Offered at Fewer than 20 Stores

Under the menu labeling rule, if a retail food establishment has more than twenty locations, all hot or prepared food sold in such locations must be labeled, even if an item is only sold at a single store.

H.R. 2017 clarifies that items offered at fewer than twenty stores are not standard menu items for a particular chain.

Revising the Enforcement Regime

H.R. 2017 also makes a number of improvements to current law regarding how the menu labeling requirements will be enforced. These provisions will provide an incentive for businesses to comply with the requirements *without* the threat of draconian, unpredictable penalties that could discourage food establishments from continuing to offer the affordable variety of food options that our customers have come to expect.

Inadvertent Human Error

Under the FDA's regulations, store owners could be subject to severe criminal penalties for violating any of the rule's dozens of complex provisions, even when such violations are inadvertent. This is particularly problematic in light of the non-uniform preparation methods that exist across convenience store chains. For example, one employee may include less batter or breading when preparing fried chicken offerings than

a different employee uses. This will inevitably lead to a different calorie count for that product. Such minor variations should not subject our industry to criminal charges.

H.R. 2017 provides that establishments acting in *good faith* would not be penalized for inadvertent human error and reasonable variations in serving sizes and ingredients.

Felony Exposure

Under FDA's regulations, every store location is required to have an employee "certify" that the establishment is compliant with the menu labeling requirements. Violations of such requirements – even minor, inadvertent violations after good faith efforts to comply – could result in criminal charges for such employees, possibly including felony charges.

H.R. 2017 eliminates the requirement that individual store owners certify that a location is compliant with the menu labeling rules. This provision appropriately pushes compliance responsibility up the corporate ladder, minimizing the criminal exposure that individual store managers may face.⁴

Private Rights of Action

Under the FDA's regulations, plaintiffs' lawyers in certain states will be able to file class action lawsuits against retail chains to enforce the menu labeling regulations. Under the current regulations, for example, calorie information will be dispersed throughout the store in different displays. There is no question that customers or employees will, from time-to-time, bump into those displays. It will be a challenge to try to keep all of those displays compliant, but there is no doubt that compliance will lapse at times without any fault of store managers. That should not create a constant threat of private litigation. This is particularly true given the complexities of FDA's menu labeling rules. An explosion of private litigation in this area will not benefit consumer health in any way; it will only serve to limit food options and/or raise food prices.

H.R. 2017 provides that only the federal government or a state government can enforce the menu labeling rules.

Providing Establishment Reasonable Time to Comply

FDA's effective date for the menu labeling rules is December 1, 2015. Many food establishments – including convenience stores, supermarkets, movie theatres, and others – did not know that they would be subject to the menu labeling rules until the end of 2014. Thus, they were given just one year to bring themselves into compliance with

⁴ A person who violates the menu labeling law may be imprisoned for not more than 1 year and/or fined not more than \$1,000. If such a violation is a person's *second* violation, or the violation occurs "with the intent to defraud or mislead," the punishment escalates to a felony of imprisonment of not more than three years and/or not more than a \$10,000 fine.

an entirely new regulatory regime. This is simply not enough time. It took FDA more than four-and-a-half years to finalize the menu labeling rules after Congress passed the healthcare reform law. It is not reasonable to give the regulated community less than a quarter of that time to come into compliance.

H.R. 2017 would delay the menu labeling rule's effective date until two years after FDA updates its regulations to comport with the legislation's provisions.

CONCLUSION

The convenience store industry takes seriously its responsibility to provide its customers meaningful nutrition information. H.R. 2017 would better enable us to do so in a way that is both practical and useful to our customers. I urge you to pass this important legislation as expeditiously as possible, and NACS looks forward to working with you and your staffs to make that happen.

Again, thank you for the opportunity to testify today. I am of course happy to answer any questions you may have.