



## *Common Sense Nutrition Disclosure Act of 2015* *H.R. 2017*

### Purpose

Improve and clarify the final rule promulgated by the Food and Drug Administration (FDA) implementing the menu-labeling requirements (Section 4205) of the *Patient Protection and Affordable Care Act* (PPACA).<sup>1</sup>

### Summary of Provisions

**Definition of Menu or Menu Board** – Under FDA’s final rule, “factors” in determining whether a covered establishment’s material is a “primary writing” that must be calorie-labeled include: lists, or has an image of, at least one standard menu item; displays the price of the item; and can be used by a consumer to make an order. Thus, the final rule not only requires covered establishments to calorie-label in-store menu boards and online ordering systems, but also the majority of print advertising, including door hangers, flyers, direct mail, and circulars. Small-business franchisees, many of whom own one or two stores and operate independently from the corporate parent, will be subject to cumbersome and costly regulatory compliance to avoid violations and possible criminal prosecution. Accordingly, the *Common Sense Nutrition Disclosure Act of 2015* defines “menu” or “menu board” as the one listing of items which the restaurant reasonably believes to be, and designates as, its menu. In addition, the bill stipulates that the ability of the consumer to order from an advertisement or similar writing – such as a photo of a menu item posted on Facebook, Twitter, Instagram, or other social media application – does not make that writing a menu or menu board. Lastly, the legislation clarifies that menu-labeling regulations are intended for standard menu items, defined as those items with substantially 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.

**Menu Items with Multiple Servings** – Permits covered establishments flexibility to select one from among several approaches to providing calorie information, including: for the whole product; the number of servings and the number of calories per serving; or the number of calories per the common unit of division.

**Remote Ordering Establishments** – Allows establishments that receive the majority of orders from customers who are off-premises – such as restaurants that offer and depend on delivery service – to provide calorie information on a remote-access menu such as one on the Internet, instead of an on-premises menu. Accordingly, establishments that receive

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<sup>1</sup> “Food Labeling; Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments; Final Rule,” 79 Fed. Reg. 71155 (December 1, 2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-12-01/pdf/2014-27833.pdf>.

minimal in-store traffic would not be required to maintain costly calorie labeling of in-store menu boards used by few customers.

**Restaurants or Similar Retail Food Establishments** – Implements “Option 2” as outlined in FDA’s proposed rule of April 6, 2011 by limiting calorie-labeling requirements to establishments that derive more than half of their total revenue from the sale of food that is prepared on-site.

**Reasonable Basis, Certification, and Liability** – PPACA stipulates that establishments must have a reasonable basis for ascertaining nutrient content disclosure. The bill clarifies that establishments acting in good faith will not be penalized for inadvertent human error and reasonable variations in serving sizes and ingredients. In addition to requiring certification from corporate headquarters, FDA added a separate requirement that each individual location have an employee certify that every food item is prepared to “adhere to the factors on which its nutrient values were determined.” As small-business franchisees are not equipped to make such certifications, the bill removes this requirement. Moreover, the bill limits suits brought against covered establishments under Section 4205 of PPACA to the federal government and states.

**Options for Variable Menu Items and Self-Service Food/Food on Display** – FDA largely rejected suggestions that covered establishments should possess the flexibility to disclose the nutrition content of variable menu items by using ranges, averages, individual labeling of flavors or components, or labeling of one preset standard build. Instead, FDA added requirements for variable menu items, including separate calorie declarations for individual toppings and calorie ranges for all available toppings and sizes. To account for the many possible combinations in variable menu items (for example, Domino’s offers pizza in approximately 34 million combinations), the bill authorizes covered establishments to provide information for variable menu items using ranges, averages, individual labeling of flavors or components, or labeling of a preset standard build (the version of the menu item served most commonly). Furthermore, the bill provides flexibility to restaurants with buffet-style/self-service operation by providing several options for the placement of calorie information.

**Implementation Timetable** – Given the complexity of the regulations and the importance of providing consumers with accurate nutritional information, it is necessary to provide covered establishments ample time to ensure compliance. As such, the legislation extends the effective date of menu-labeling requirements to two years after final rules implementing the bill are issued.