

# Union Calendar No. 360

115<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# H. R. 772

[Report No. 115-486]

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.

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## IN THE HOUSE OF REPRESENTATIVES

JANUARY 31, 2017

Mrs. MCMORRIS RODGERS (for herself, Mr. ALLEN, Mr. BARLETTA, Mr. BLUM, Mr. BUCSHON, Mr. CÁRDENAS, Mr. COLLINS of New York, Mr. COLLINS of Georgia, Mr. CRAWFORD, Mr. CUELLAR, Mr. GOSAR, Mr. HARRIS, Mrs. HARTZLER, Mr. HUDSON, Ms. JENKINS of Kansas, Mr. JONES, Mr. KIND, Mr. LATTA, Mr. MOOLENAAR, Mr. MOONEY of West Virginia, Mr. MULLIN, Mr. NEWHOUSE, Mr. PEARCE, Mr. POE of Texas, Mr. ROTHFUS, Ms. SINEMA, Mr. SMITH of New Jersey, Ms. STEFANIK, Mr. VALADAO, Mrs. WAGNER, Mr. WALBERG, Mrs. WALORSKI, Mrs. MIMI WALTERS of California, Mr. WALZ, Mr. WESTERMAN, and Mr. YOUNG of Iowa) introduced the following bill; which was referred to the Committee on Energy and Commerce

JANUARY 8, 2018

Additional sponsors: Mrs. BROOKS of Indiana, Mr. LANCE, Mr. AGUILAR, Mr. HOLDING, Mr. ROKITA, Mr. THOMAS J. ROONEY of Florida, Mr. CARTER of Georgia, Mr. LUCAS, Mr. BARR, Mr. FERGUSON, Mr. ROE of Tennessee, Mr. CARTER of Texas, Mr. TURNER, Ms. TENNEY, Mr. BUCK, Mr. GALLAGHER, Mr. POSEY, Mr. WOMACK, Mr. SHUSTER, Mr. LUETKEMEYER, Mr. GIBBS, Mr. KING of Iowa, Mr. RUSSELL, Mr. GRIFFITH, Mr. MITCHELL, Mr. LEWIS of Minnesota, Mr. RUTHERFORD, Mr. BILIRAKIS, Mr. KINZINGER, Mr. FLEISCHMANN, Mr. BUDD, Mr. LAMBORN, Mr. HIGGINS of Louisiana, Ms. HERRERA BEUTLER, Mr. SMITH of Missouri, Mr. GROTHMAN, Mr. CRAMER, Mr. JOYCE of Ohio, Mr. DUNN, Mrs. LOVE, Mr. MESSER, Mr. MURPHY of Pennsylvania, Mr. SANFORD, Mr. HARPER, Mr. ROUZER, Mr. SHIMKUS, Mr. CHABOT, Mr. WALKER, Mr. FITZPATRICK, Mr. RATCLIFFE, and Mr. ISSA

JANUARY 8, 2018

Reported with an amendment, committed to the Committee of the Whole  
House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in *italic*]

[For text of introduced bill, see copy of bill as introduced on January 31, 2017]

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## **A BILL**

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,*

3 **SECTION 1. SHORT TITLE.**

4        *This Act may be cited as the “Common Sense Nutri-*  
5 *tion Disclosure Act of 2017”.*

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

9        *(a) IN GENERAL.—Section 403(q)(5)(H) of the Federal*  
10 *Food, Drug, and Cosmetic Act (21 U.S.C. 343(q)(5)(H)) is*  
11 *amended—*

12                    *(1) in subclause (ii)—*

13                                    *(A) in item (I)(aa), by striking “the num-*  
14 *ber of calories contained in the standard menu*  
15 *item, as usually prepared and offered for sale”*  
16 *and inserting “the number of calories contained*  
17 *in the whole standard menu item, or the number*  
18 *of servings (as reasonably determined by the res-*  
19 *taurant or similar retail food establishment) and*  
20 *number of calories per serving, or the number of*  
21 *calories per the common unit division of the*  
22 *standard menu item, such as for a multiserving*  
23 *item that is typically divided before presentation*  
24 *to the consumer”;*

1           (B) in item (II)(aa), by striking “the num-  
2           ber of calories contained in the standard menu  
3           item, as usually prepared and offered for sale”  
4           and inserting “the number of calories contained  
5           in the whole standard menu item, or the number  
6           of servings (as reasonably determined by the res-  
7           taurant or similar retail food establishment) and  
8           number of calories per serving, or the number of  
9           calories per the common unit division of the  
10          standard menu item, such as for a multiserving  
11          item that is typically divided before presentation  
12          to the consumer”; and

13           (C) by adding at the end the following flush  
14          text:

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

23           (2) in subclause (iii)—

1           (A) by inserting “either” after “a res-  
2           taurant or similar retail food establishment  
3           shall”; and

4           (B) by inserting “or comply with subclause  
5           (ii)” after “per serving”;  
6           (3) in subclause (iv)—

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

9           “(I) *IN GENERAL.*—For the purposes of this  
10          clause”;

11          (B) by striking “and other reasonable  
12          means” and inserting “or other reasonable  
13          means”; and

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

15          “(II) *PERMISSIBLE VARIATION.*—If the res-  
16          taurant or similar food establishment uses such  
17          means as the basis for its nutrient content disclo-  
18          sures, such disclosures shall be treated as having  
19          a reasonable basis even if such disclosures vary  
20          from actual nutrient content, including but not  
21          limited to variations in serving size, inadvertent  
22          human error in formulation or preparation of  
23          menu items, variations in ingredients, or other  
24          reasonable variations.”;

25          (4) by amending subclause (v) to read as follows:

1           “(v) *MENU VARIABILITY AND COMBINATION*  
2           *MEALS.*—*The Secretary shall establish by regulation*  
3           *standards for determining and disclosing the nutrient*  
4           *content for standard menu items that come in dif-*  
5           *ferent flavors, varieties, or combinations, but which*  
6           *are listed as a single menu item, such as soft drinks,*  
7           *ice cream, pizza, doughnuts, or children’s combina-*  
8           *tion meals. Such standards shall allow a restaurant*  
9           *or similar retail food establishment to choose whether*  
10           *to determine and disclose such content for the whole*  
11           *standard menu item, for a serving or common unit*  
12           *division thereof, or for a serving or common unit di-*  
13           *vision thereof accompanied by the number of servings*  
14           *or common unit divisions in the whole standard*  
15           *menu item. Such standards shall allow a restaurant*  
16           *or similar retail food establishment to determine and*  
17           *disclose such content by using any of the following*  
18           *methods: ranges, averages, individual labeling of fla-*  
19           *vors or components, or labeling of one preset standard*  
20           *build. In addition to such methods, the Secretary may*  
21           *allow the use of other methods, to be determined by*  
22           *the Secretary, for which there is a reasonable basis*  
23           *(as such term is defined in subclause (iv)(II)).”;*  
24           (5) *in subclause (x)—*

1           (A) by striking “Not later than 1 year after  
2           the date of enactment of this clause, the Sec-  
3           retary shall promulgate proposed regulations to  
4           carry out this clause.” and inserting “Not later  
5           than 1 year after the date of enactment of the  
6           Common Sense Nutrition Disclosure Act of 2017,  
7           the Secretary shall issue proposed regulations to  
8           carry out this clause, as amended by such Act.  
9           Final regulations to carry out this clause, in-  
10          cluding any regulations promulgated before the  
11          date of enactment of the Common Sense Nutri-  
12          tion Disclosure Act of 2017, shall not take effect  
13          until such compliance date as shall be specified  
14          by the Secretary in the regulations promulgated  
15          pursuant to the Common Sense Nutrition Disclo-  
16          sure Act of 2017.”; and

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

18           “(IV) CERTIFICATIONS.—Restaurants and  
19           similar retail food establishments shall not be re-  
20           quired to provide certifications or similar signed  
21           statements relating to compliance with the re-  
22           quirements of this clause.”;

23           (6) by amending subclause (xi) to read as fol-  
24          lows:

25           “(xi) DEFINITIONS.—In this clause:

1           “(I) *MENU; MENU BOARD.*—*The term*  
2           *‘menu’ or ‘menu board’ means the one listing of*  
3           *items which the restaurant or similar retail food*  
4           *establishment reasonably believes to be, and des-*  
5           *ignates as, the primary listing from which cus-*  
6           *tomers make a selection in placing an order. The*  
7           *ability to order from an advertisement, coupon,*  
8           *flyer, window display, packaging, social media,*  
9           *or other similar writing does not make the writ-*  
10          *ing a menu or menu board.*

11          “(II) *PRESET STANDARD BUILD.*—*The term*  
12          *‘preset standard build’ means the finished*  
13          *version of a menu item most commonly ordered*  
14          *by consumers.*

15          “(III) *STANDARD MENU ITEM.*—*The term*  
16          *‘standard menu item’ means a food item of the*  
17          *type described in subclause (i) or (ii) of subpara-*  
18          *graph (5)(A) with the same recipe prepared in*  
19          *substantially the same way with substantially*  
20          *the same food components that—*

21                 “(aa) *is routinely included on a menu*  
22                 *or menu board or routinely offered as a self-*  
23                 *service food or food on display at 20 or*  
24                 *more locations doing business under the*  
25                 *same name; and*



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

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

4                   “(xii) *OPPORTUNITY TO CORRECT VIOLATIONS.*—  
5                   *Any restaurant or similar retail food establishment*  
6                   *that the Secretary determines is in violation of this*  
7                   *clause shall have 90 days after receiving notification*  
8                   *of the violation to correct the violation. The Secretary*  
9                   *shall take no enforcement action, including the*  
10                   *issuance of any public letter, for violations that are*  
11                   *corrected within such 90-day period.”.*

12                   (b) *NATIONAL UNIFORMITY.*—*Section 403A(b) of the*  
13                   *Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343–1(b))*  
14                   *is amended by striking “may exempt from subsection (a)”*  
15                   *and inserting “may exempt from subsection (a) (other than*  
16                   *subsection (a)(4))”.*

17                   **SEC. 3. LIMITATION ON LIABILITY FOR DAMAGES ARISING**  
18   **FROM NONCOMPLIANCE WITH NUTRITION LA-**  
19   **BELING REQUIREMENTS.**

20                   *Section 403(q)(5)(H) of the Federal Food, Drug, and*  
21                   *Cosmetic Act (21 U.S.C. 343(q)(5)(H)), as amended by sec-*  
22                   *tion 2, is further amended by adding at the end the fol-*  
23                   *lowing:*

24                   “(xiii) *LIMITATION ON LIABILITY.*—*A restaurant*  
25                   *or similar retail food establishment shall not be liable*

1       *in any civil action in Federal or State court (other*  
2       *than an action brought by the United States or a*  
3       *State) for any claims arising out of an alleged viola-*  
4       *tion of—*

5                       *“(I) this clause; or*

6                       *“(II) any State law permitted under section*  
7                       *403A(a)(4).”.*



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