

115TH CONGRESS
1ST SESSION

S. 261

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.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 1, 2017

Mr. BLUNT (for himself, Mr. KING, Mrs. McCASKILL, Mr. McCAIN, Mr. BOOZMAN, Mr. SCOTT, and Ms. HEITKAMP) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

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”.

1 **SEC. 2. AMENDING CERTAIN DISCLOSURE REQUIREMENTS**
 2 **FOR RESTAURANTS AND SIMILAR RETAIL**
 3 **FOOD ESTABLISHMENTS.**

4 (a) IN GENERAL.—Section 403(q)(5)(H) of the Fed-
 5 eral Food, Drug, and Cosmetic Act (21 U.S.C.
 6 343(q)(5)(H)) is amended—

7 (1) in subclause (ii)—

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

20 (B) in item (II)(aa), by striking “the num-
 21 ber of calories contained in the standard menu
 22 item, as usually prepared and offered for sale”
 23 and inserting “the number of calories contained
 24 in the whole standard menu item, or the num-
 25 ber of servings (as reasonably determined by
 26 the restaurant or similar retail food establish-

ment) and number of calories per serving, or the number of calories per the common unit division of the standard menu item, such as for a multiserving item that is typically divided before presentation to the consumer”; and

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

“In the case of restaurants or similar retail food establishments where the majority of orders are placed by customers who are off-premises at the time such order is placed, the information required to be disclosed under items (I) through (IV) may be provided by a remote-access menu (such as a menu available on the Internet) as the sole method of disclosure instead of on-premises writings.”;

(2) in subclause (iii)—

(A) by inserting “either” after “a restaurant or similar retail food establishment shall”; and

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

(3) in subclause (iv)—

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

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

3 (B) by striking “and other reasonable
4 means” and inserting “or other reasonable
5 means”; and

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

7 “(II) PERMISSIBLE VARIATION.—If the
8 restaurant or similar food establishment uses
9 such means as the basis for its nutrient content
10 disclosures, such disclosures shall be treated as
11 having a reasonable basis even if such disclo-
12 sures vary from actual nutrient content, includ-
13 ing variations in serving size, inadvertent
14 human error in formulation or preparation of
15 menu items, variations in ingredients, or other
16 reasonable variations.”;

17 (4) by amending subclause (v) to read as fol-
18 lows:

19 “(v) MENU VARIABILITY AND COMBINATION
20 MEALS.—The Secretary shall establish by regulation
21 standards for determining and disclosing the nutri-
22 ent content for standard menu items that come in
23 different flavors, varieties, or combinations, but
24 which are listed as a single menu item, such as soft
25 drinks, ice cream, pizza, doughnuts, or children’s

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

18 (5) in subclause (x)—

19 (A) by striking “Not later than 1 year
 20 after the date of enactment of this clause, the
 21 Secretary shall promulgate proposed regulations
 22 to carry out this clause.” and inserting “Not
 23 later than 1 year after the date of enactment of
 24 the Common Sense Nutrition Disclosure Act of
 25 2017, the Secretary shall issue proposed regula-

tions to carry out this clause, as amended by such Act. Any final regulations that are promulgated pursuant to the Common Sense Nutrition Disclosure Act of 2017, and any final regulations that were promulgated pursuant to this clause before the date of enactment of the Common Sense Nutrition Disclosure Act of 2017, shall not take effect earlier than 2 years after the promulgation of final regulations pursuant to the Common Sense Nutrition Disclosure Act of 2017.”; and

(B) by adding at the end the following:

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

(6) by amending subclause (xi) to read as follows:

“(xi) DEFINITIONS.—In this clause:

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

customers make a selection in placing an order.
 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.

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

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

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

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

(7) by adding at the end the following:

“(xii) OPPORTUNITY TO CORRECT VIOLA-
 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).”.

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