

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.

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## 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

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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”.

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-

1           ment) and number of calories per serving, or  
 2           the number of calories per the common unit di-  
 3           vision of the standard menu item, such as for  
 4           a multiserving item that is typically divided be-  
 5           fore presentation to the consumer”; and

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

8           “In the case of restaurants or similar retail food es-  
 9           tablishments where the majority of orders are placed  
 10          by customers who are off-premises at the time such  
 11          order is placed, the information required to be dis-  
 12          closed under items (I) through (IV) may be provided  
 13          by a remote-access menu (such as a menu available  
 14          on the Internet) as the sole method of disclosure in-  
 15          stead of on-premises writings.”;

16          (2) in subclause (iii)—

17                   (A) by inserting “either” after “a res-  
 18           taurant or similar retail food establishment  
 19           shall”; and

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

22          (3) in subclause (iv)—

23                   (A) by striking “For the purposes of this  
 24           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-

1 tions to carry out this clause, as amended by  
 2 such Act. Any final regulations that are pro-  
 3 mulgated pursuant to the Common Sense Nu-  
 4 trition Disclosure Act of 2017, and any final  
 5 regulations that were promulgated pursuant to  
 6 this clause before the date of enactment of the  
 7 Common Sense Nutrition Disclosure Act of  
 8 2017, shall not take effect earlier than 2 years  
 9 after the promulgation of final regulations pur-  
 10 suant to the Common Sense Nutrition Disclo-  
 11 sure Act of 2017.”; and

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

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

18 (6) by amending subclause (xi) to read as fol-  
 19 lows:

20 “(xi) DEFINITIONS.—In this clause:

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

1 customers make a selection in placing an order.  
 2 The ability to order from an advertisement,  
 3 coupon, flyer, window display, packaging, social  
 4 media, or other similar writing does not make  
 5 the writing a menu or menu board.

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

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

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

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

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

24 “(xii) OPPORTUNITY TO CORRECT VIOLA-  
 25 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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