



**THE VOICE OF FOOD RETAIL**

Feeding Families  Enriching Lives

February 1, 2017

The Honorable Angus S. King, Jr.  
United States Senate  
Washington, D.C. 20515

Dear Senator King,

On behalf of the supermarket industry, I extend my sincerest thanks for your continued leadership in introducing and pursuing adoption of the needed reforms contained in the *Common Sense Nutrition Disclosure Act (CSNDA – S. 261)*. The members of the Food Marketing Institute (FMI) commit our support for enactment of this critical legislation as soon as possible and seek actions to be taken for FDA to implement these measures prior to moving forward with compliance enforcement, scheduled for May 5, 2017.

The *Common Sense Nutrition Disclosure Act* fixes serious problems that FMI and our food retailer members have been continually facing with a “square-peg-in-a-round-hole” approach to FDA’s application of menu labeling to grocery stores. FMI seeks this legislation because despite the supermarket industry’s numerous meetings, conference calls, and conversations with the agency over the last six years, FDA was unable to fix these problems through its rulemaking or its guidance, which has consequently led to complications, confusion, and delays.

The *Common Sense Nutrition Disclosure Act* preserves the availability for consumers of local foods or fresh items only sold at a few stores. Under the current FDA rule, if a supermarket uses a local vendor or supplier for an item that is sold at one or two stores, the retailer, for compliance purposes, will require that local business to provide the supermarket with a nutrition analysis, labeling/signage, recordkeeping (including potentially the recipe) and sign an affidavit. But since the liability exposure under the menu labeling rule ultimately rests with the food retailer, supermarkets, for practical purposes, are being forced to cease these local arrangements. The CSNDA protects these locally-made foods by applying the menu labeling regulations only to foods that are sold across several locations.

The *Common Sense Nutrition Disclosure Act* allows for use of a menu board in prepared foods areas instead of requiring individual labels for each item. The current FDA rule is extremely prescriptive in that it requires each calorie label or sign to be aligned with each individual food item in a salad or food bar. This rigidity creates the strong likelihood that labels and foods will be mismatched as items get switched or replaced, triggering corresponding enforcement or liability exposure for technical non-compliance. The CSNDA would allow stores to place all of the same information for the same foods on a menu/menu board adjacent to the food display, which is more practical from a compliance standpoint and also better facilitates customers' opportunity to compare calorie counts between and among food items.

This bill provides enforcement and liability protections for good-faith compliance efforts and inadvertent human errors. Supermarkets’ compliance personnel are very anxious about liability and felony enforcement even with good-faith compliance. While it may sound extreme, a menu labeling violation

is considered misbranding under the Food, Drug & Cosmetic Act, carrying severe, even criminal, penalties. Since even FDA personnel have indicated that oversight should be more informative than punitive, the CSNDA clarifies this approach in writing by providing a 90-day corrective action period if a technical problem is identified, ensures that FDA and states with identical standards are the overseers so compliance and enforcement is consistent, and finally, clarifies that store-level employees are not liable for “certifications” under the menu labeling rule.

Your bipartisan legislation provides a sensible approach to providing nutrition transparency to customers that provides flexibility for supermarkets to successfully implement the menu labeling statute. We will work with you and others to enact this critical legislation as soon as possible and for actions to be taken for FDA to implement these measures prior to going forward with compliance.

Sincerely,

A handwritten signature in black ink, reading "Leslie G. Sarasin". The signature is written in a cursive, flowing style.

Leslie G. Sarasin  
President and Chief Executive Officer