



June 27, 2018
Agricultural Marketing Service
United States Department of Agriculture
Docket # AMS-TM-17-0050

Dear Secretary Perdue,

Please accept the following comments on Docket # AMS-TM-17-0050 the Notice of Proposed Rulemaking for the National Bioengineered Food Disclosure Standard (NBFDS) submitted by the Ohio Ecological Food and Farm Association (OEFFA).

OEFFA is a coalition of almost 5,000 farmers, gardeners, retailers, educators, researchers, and others who share a desire to build a healthy food system that brings prosperity to family farmers and rural communities, meets the growing consumer demand for local food, and safeguards the environment. OEFFA also operates one of the country's oldest and largest USDA-accredited organic certification agencies.

We represent the interests of organic producers, handlers, and consumers choosing foods produced under the standards codified through the Organic Foods Production Act of 1990 and the National Organic Program as well as a significant constituency of non-GE producers. Of our farm members, approximately half are certified organic and most of the remaining operations grow without the use of GE technology.

OEFFA appreciates the USDA's commitment to an open, transparent process for the development and implementation of the National Bioengineered Food Disclosure Standard Law. We hope that the USDA will heed comments from all sectors of the stakeholder community as the rules are finalized. Food manufacturers are already moving forward with distinct types of labeling absent USDA guidance. It is critically important that the final labeling options work not just for food manufactures but also for the public.

In implementing the law as written by Congress, the USDA must ensure that the information consumers seek is not obfuscated nor are they prevented in any other way from having full knowledge about the characteristics of the food they purchase. To do so would go against the intent of the law as stated by the legislature, and against the will of the public.

Thank you for your careful consideration of our comments.

Amalie Lipstreu
OEFFA Policy Program Coordinator

In 2015 OEFFA contracted with Public Policy Polling for an independent review of Ohioans attitudes on genetically engineered foods and labeling of those products. The poll found that 87% felt GE foods should be labeled. This strong sentiment cut across party affiliation.

GE labeling has been a leading policy priority for our members for more than five years. Contrary to the way the labeling issue is often discussed, our members do not seek this information solely or even primarily due to food safety concerns. Our members are aware of what is involved in the process of producing food in conventional, organic, and non-GE farming systems. Informative GE labels allow the public to support the kind of agriculture that produces food in the way they want and are needed for them to make those decisions. The wording and/or symbols should be clearly provided, without hurdles or prerequisites, and the text and images should be value neutral.

I. *When and how should GE presence be disclosed?*

While the law provides caveats for large categories of GE inputs not being labeled, the department should err on the side of transparency as much as legally possible to prevent erosion of public trust.

OEFFA has a strong and foundational disagreement with USDA AMS in the use of the term “Bioengineered” or “BE” for public disclosure of genetically engineered food. The Secretary has the authority to determine terms other than bioengineering in disclosure. We strongly urge the Secretary to include terms “Genetically Engineered” (GE) or “genetically modified organism” (GMO). These have been the terms used for several decades, and provide consistency with other state and federal agencies, federal policy and international standards and guidelines. To introduce a new and unfamiliar term would subvert the intent of the law, degrade any value in the label and be a complete betrayal of the public trust.

While some industry members have denounced the terms GE and GMO as having negative connotations, a recent report found that concern is not playing out in the marketplace. According to the Organic and Non-GMO report, actual market data combined with published research found that:

“... the labels have had no impact on product sales. In fact, research has even indicated that GMO labels improve people’s confidence in GM foods.”¹

We appreciate that companies such as Campbell’s, General Mills, Mars, Inc., ConAgra, Frito-Lay, and Kellogg’s are using on-package labels with the terms “Produced with genetic engineering” or “Made with or Partially produced with genetically engineered ingredients.” Given that industry experience has shown this label to conform with their marketing needs, not adversely affect sales, and in fact be consistent with international marketing, this option should be acceptable to others in the marketplace.

1. The Organic and Non-GMO report: <http://non-gmoreport.com/articles/food-companies-say-gmo-labels-no-impact-product-sales/>

Most of the items on store shelves are not raw genetically engineered products or comprised of only one ingredient. The majority of food products are highly processed and it is for those items in particular that clear and transparent GE labeling is necessary. Ranking member of the Senate Agriculture Committee Senator Debbie Stabenow (D-MI) included a colloquy stating that public law 114-216 allows for "...the labeling of highly refined products derived from GMO crops including soybean oil from GMO soybeans, high fructose corn syrup made from GMO corn, and sugar made from GMO sugar beets." ² Section 293 of the NBFDL establishes that the law applies to "...any bioengineered food and any food that *may be* bioengineered..." (emphasis added). Additionally, failure to include GE sugars and oils as well as all forms of genetic engineering could create conflict with our trading partners and their GE labeling requirements.

Recommendations

- **The definition of GE foods in the law should include all foods produced from bioengineering.**
- **On the question of highly refined GE products, they can and should be labeled.**
- **Add and encourage use of the terms Genetically Engineered (GE) and/or Genetically Modified Organism (GMO).**

II. *Adoption of Highly Adopted and Not Highly Adopted Lists of Bioengineered Foods*

AMS asked for comment on whether the NBFDL should include

(1) a list of GE foods that are commercially available in the U.S. with a high adoption rate (85% or more) and (2) a proposed list of GE foods that are NOT highly adopted (85% or less).

The use of these lists as a basis for classifying products is problematic in that the provisions for list maintenance/revision would allow known GE products to be utilized for approximately two years before being labeled. AMS is also proposing the use of the terms "May be a bioengineered food" or "May contain a bioengineered food ingredient" for foods on the "not highly adopted" list. Manufacturers using food ingredients that are genetically engineered, whether highly or not highly adopted, should use the terms "Contains a genetically engineered food ingredient" or "Genetically engineered food." To not clearly identify a known GE food is less than forthright, and goes against the intent of the law and the constituents who advocated for GE labeling. The federal government must not facilitate what may be considered fraudulent or deceptive practices, which is precisely what it would be doing by allowing known GE products to evade labeling.

Recommendation

All foods produced with GE ingredients should clearly disclose the presence of those ingredients, regardless of their adoption rate.

III. *Definition of “Bioengineering”*

The definition of “bioengineering” should be consistent with international standards and include the broadest range of technologies and products. The reasons consumers want GE labeling are multifaceted, and go beyond health concerns. An increasing percentage of the public is also interested in the agricultural systems and processes that go into a food product, not just its immediate contents.

We ask the USDA to include transgenic and gene editing technologies in the definition of bioengineering. In reference to the NBFDL, USDA indicated that the law authorized the extension of disclosure requirements to both classes of techniques and includes newer forms such as CRISPR and RNAi. We urge AMS to follow the lead of the Food and Drug Administration in identifying “bioengineering” as a synonym for “modern biotechnology.” Modern biotechnology is also accepted by the National Organic Standards Board, and has a common, globally accepted standard definition through Codex Alimentarius and recognized by the World Trade Organization, the authoritative standard for settling international trade disputes.³

AMS requested feedback on definitions of “conventional breeding” and “found in nature.” We agree that definitions for these terms would provide helpful guidance in the implementation of the law. In developing those definitions, we ask the agency to use a plain language reading of the terms to encourage broad coverage of the rule. Clear and straightforward language will prevent confusion and additional frustration around this issue.

Recommendations

- **The disclosure requirement should include transgenic and gene editing techniques.**
- **As USDA has not provided proposed definitions, if and when they do so, it should be done through a supplemental proposed rule with opportunity to comment before being finalized.**

IV. *Thresholds*

AMS requested comments on three proposals for determining at what level GE material can be present in a food before triggering the label requirement. A stated goal for this component is the identification of an option that would present the lowest cost to regulated entities while providing practicality and consistency.

The option that best satisfies this goal is Alternative 1-B, which would exempt from disclosure products that contain ingredients with GE material that is “inadvertent or technically unavoidable,” and does not exceed 0.9 percent of the weight of the specific ingredient. In the proposed rule, AMS acknowledges that this alternative aligns with existing industry standards as well as the thresholds of some U.S. trading partners. It is worth noting that both the Non-GMO Project and the European Union set their labeling thresholds at 0.9 percent.⁴

3. <http://www.fao.org/fao-who-codexalimentarius/about-codex/en>

4. <https://www.nongmoproject.org/wp-content/uploads/2017/09/Non-GMO-Project-Standard-Version-14.2.pdf> and https://ec.europa.eu/food/plant/gmo/traceability_labelling_en

AMS should not permit option 1-C as it clearly subverts the intention of the law by allowing products with known GE ingredients to evade labeling.

Recommendations:

- **Require labeling for all known use of GE ingredients.**
- **The inadvertent or technically unavoidable presence of GE material exceeding 0.9 percent should trigger the disclosure.**

V. *Very Small Manufacturer Exemptions*

AMS is proposing to define “very small” manufacturers as those with less than \$2.5 million in annual sales. This definition would exempt 74 percent of all food manufacturers, 4 percent of products, and 1 percent of sales. OEFFA believes this option is sufficiently flexible to accommodate the majority of food manufacturers while providing meaningful coverage of the market.

Recommendation

- **Retain the proposed definition of “very small manufacturer” as having less than \$2.5 million in annual sales.**

VI. *Disclosure Options*

a. *Text*

OEFFA supports Option #1, text on package disclosure using terms recognized by the public and consistent with what many food manufacturers are currently using. The fact that on-package text disclosure indicating that foods have been made with genetic engineering is supported by the industry and has not negatively impacted their business indicates it can be used more broadly without adverse economic consequences.

It is important that all foods manufactured with GE ingredients bear the label regardless of adoption rate and that the terms “Genetically Engineered” “GE” or “Genetically Modified Organism” or “GMO” be used in text disclosure. The use of term “Bioengineered” or “BE” is inconsistent with the intent of the law and will continue to undermine public trust in manufactured foods and should not be used.

Recommendation

- **Adopt and encourage continuation of on-package text labeling indicating foods produced with genetic engineering.**

b. *Symbol*

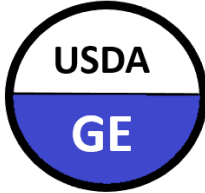
The symbols proposed under Option #2 cannot be accepted as their smiling faces and friendly suns are clearly meant to communicate positive values. Any symbols adopted must

be value neutral and simply communicate information. When the National Organic Program was established it was emphasized that any marketing for organic products had to be value neutral so as not to imply the product is any way superior to conventionally grown foods. The government should not be picking winners and losers in the marketplace by placing GE products in a superior market position. This NBFDL was codified because of the overwhelming desire of the public to have more information about the foods they consume. The law speaks to neutrality by stating that these foods “...shall not be treated as safer than, or not as safe as, a non-bioengineered counterpart...”

The options presented include smiling faces, sunshine and nature scenes, one of which closely resembles one of the European organic labels. This could cause confusion and affect trading relationships in EU countries.



OEFFA supports the use of symbols such as the ones below that convey, in a neutral manner, foods that have been produced using genetic engineering.



Recommendation

- **OEFFA strongly recommends that the USDA AMS utilize a symbol that is straightforward and value neutral. The symbol should not compete or conflict with organic symbols from the US or abroad.**

c. Electronic Disclosures

There are many problems with the forms of electronic disclosure that have been proposed by the agency. The USDA commissioned study by Deloitte found that approximately 75 percent of respondents did not know what a QR code was, and even those that did had difficulty using apps for scanning digital links.⁵

5. <https://www.ams.usda.gov/reports/study-electronic-or-digital-disclosure>

In addition to being ineffective because of these issues, this option puts the time and burden of disclosure on the public rather than the manufacturers utilizing this technology. Further, there are serious equity concerns about those who either do not have access to a smartphone or have limited broadband in their area.

While we appreciate the effort made by USDA AMS staff to come up with additional electronic disclosure options, the text message option still requires access to a wireless or cellular network, involves a text-capable phone or other device, and may cost the consumer for each text message they send and/or receive. The equity and access concerns remain unresolved with this option. Once again, this attempt also ignores the value of the additional time required for an electronic search for each food item purchased.

Recommendation

- **OEFFA strongly opposes the use of QR codes and the text message option. If these remain available options, they must be paired with a neutral symbol on the product label.**

VII. *Impacts on other label claims*

a. Certified Organic

The law is clear in stating that food certified under the National Organic Program (NOP) can make a non-GMO absence claim, and the USDA has interpreted this to mean that certified organic products are exempt from the disclosure requirement. However, USDA does not acknowledge in the proposed rule a point that is clear in the authorizing statute: that certifying a food under the NOP is considered sufficient to allow that food to carry a non-GMO absence claim. Just as the Secretary has the authority to include other terms such as “genetically engineered” as part of the disclosure standard, the law also gives the Secretary authority to establish “consistency between the (1) the national bioengineered food disclosure standard...and (2) the Organic Foods Production Act of 1990 (7 U.S.C. 6501 et seq.) and any rules or regulations implementing that Act.”⁶ It is therefore critical that the new standard does not disrupt the existing markets for organic products.

USDA has proposed a standard that does not allow “GE” or “GMO” labeling claims to be interchangeable with “bioengineered” or “BE.” This raises a very significant concern that the new standard will impact the absence claims allowed on certified organic products, potentially requiring them to carry a confusing “non-BE” labeling claim. USDA must make it clear in the final rule that the use of the term “bioengineering” as the disclosure standard does not require absence claims to use the same terms being proposed in this notice. Furthermore, this confusion could be avoided by the use of the term “genetically engineered” or “GE”.

Recommendations

- **Ensure that the final rule includes language indicating that certified organic producers can use absence claims and that those claims do not need to use the terms “bioengineered” or “BE” and are able to continue using non-GMO or similar claims as authorized by Congress.**
- **Include a provision that explicitly states that the final rule does not affect the definition of “excluded methods” or any other definition under the National Organic Program.**

VIII. Enforcement

The law authorizes USDA to enforce the disclosure through examination of records and audits, including making the summary and findings accessible to the public. As there are no statutory enforcement mechanisms in the law, we urge encourage a schedule of auditing and publishing those findings on a regular basis.

Recommendation

- **Include regular audits – at a minimum of twice per year – and publish those results in a manner that is accessible to the public**

IX. Closing

The Hartman Group has been conducting research on the food and beverage industry for more than 25 years and their recent research illustrates the point that consumers are interested in more than the health consequences of the food choices they make:

“Consumers understand now, more than ever before, that the agricultural practices that bring the food to their tables have a tremendous impact on the environment because of the millions of acres in this country that are dedicated to crops, orchards and pasturelands. They understand that their food and beverage choices can make a difference by creating the demand that will motivate producers and food and beverage manufacturers to develop earth-sustainable products.”⁷

It is time to allow the marketplace to respond to the desire of consumers and not stand in the way of clear and transparent information that conveys information about the systems and processes of food production.

7. <https://www.hartman-group.com/hartbeat/738/sustainability-in-purchasing-food-and-the-environment-the-consumer-perspective>