



Consumer Federation of America

July 3, 2018

The Honorable George “Sonny” Perdue III
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Avenue, SW
Washington, DC 20250
Email: befooddisclosure@ams.usda.gov

Re: Docket No. AMS-TM-17-0050, Implementation of the National Bioengineered Food Disclosure Standard (Pub. L. 114-216)

Dear Secretary Perdue:

Consumer Federation of America appreciates the opportunity to submit the following comments on the USDA Agricultural Marketing Service’s (AMS) proposed rule on labeling genetically engineered (“GE” or “GMO”) foods. This rule implements the National Bioengineered Food Disclosure Standard (Pub. L. 114-216), which Congress passed just days before Vermont’s GMO labeling law was set to go into effect. Connecticut and Maine also passed GMO labeling laws prior to passage of Pub. L. 114-216. These laws are now preempted, and as a result, consumers remain in the dark about what foods are made with GMOs, despite poll after poll showing that upwards of nine out of ten Americans want the right to know whether the food they buy contains GMOs. AMS should therefore act expeditiously to carry out the law and give consumers information about what foods contain GMOs. In particular, the final rule should provide for labeling that is:

- **Comprehensive:** Disclosure requirements should apply to all GMO foods, including refined sugars and oils, and to foods made with new forms of genetic engineering such as CRISPR/Cas9. The definition of GMOs, and of any labeling exemptions, should not conflict unnecessarily with existing federal regulations and with the laws of the 64 other countries that already require GMO labeling, particularly those of major trading partners.
- **Comprehensible:** Labels should use terms that American consumers understand—“genetically modified organism” or “genetically engineered”—rather than the comparatively novel “bioengineered.” Symbols should neutrally inform consumers of whether a product includes GMOs. The proposed symbols featuring the acronym “BE” in either a smiling face or against a backdrop of sun and blue sky will likely confuse many consumers, leading them to believe the “BE” symbol signifies superior safety or quality.
- **Accessible:** Labels should make information about GMO ingredients reasonably accessible for all consumers, not just those who have a smartphone, the latest apps, and reliable internet access, or the time to send text messages soliciting information about food ingredients.

- Timely: Congress made clear its intent that AMS act expeditiously to inform consumers by requiring that the agency finalize regulations by July 29, 2018. Allowing companies to put off GMO labeling until 2022 runs contrary to that intent, and is an unjustifiable delay considering the large number of companies already labeling GMO ingredients.

Consumers deserve the right to know

The vast majority of American consumers want GMO labeling, and they want it for a variety of legitimate reasons. These include environmental, social, ethical, and food safety concerns. Proponents of GMOs deride concerns surrounding their safety as fear mongering, and even many labeling supporters are quick to concede that “GMOs are safe.” This assertion, however, is subject to important qualifications. While a recent expert panel of the National Academies of Sciences (NAS) “found no substantiated evidence of a difference in risks to human health between currently commercialized genetically engineered (GE) crops and conventionally bred crops,”¹ it stopped short of characterizing all GMOs as inherently safe. Indeed, early in the history of GMOs, researchers discovered that they could boost the nutritional profile of soybeans by inserting genes from the Brazil nut.² The result, however, was a soybean that triggered potentially dangerous reactions in people with nut allergies.³ Because of the findings, the GMO soybean in question never became commercially available. Nevertheless, the episode illustrates that genetic engineering can create unique food safety risks.

The chemicals used in conjunction with GMOs raise additional concerns. GMOs that are widely available on the market today are engineered for one (or both) of two purposes: insect resistance and herbicide resistance.⁴ The herbicide most predominantly used with GMO crops is glyphosate, also known as Roundup. In March of 2015, the World Health Organization (WHO) classified glyphosate as “probably carcinogenic to humans.”⁵ At the same time, increased reliance on “Roundup Ready” crops has “resulted in an explosion of glyphosate sales and usage in the past 20 years,” with recent estimates indicating that the Monsanto company sells around \$5 billion worth of the chemical each year.⁶ Admittedly, some herbicide use has nothing to do with GMOs. For example, sugar cane and wheat farmers increasingly apply glyphosate to crops just before harvest as a desiccant.⁷ However, many researchers view GMOs as a key factor driving increased reliance on herbicides like glyphosate. According to one recent study, the need to combat “superweeds” that develop as a result of reliance on GMO crops and their associated herbicides will cause total herbicide use in the United

¹ National Academies of Sciences. “Genetically Engineered Crops: Experiences and Prospects,” Report in Brief, May 2016, <https://www.nap.edu/resource/23395/GE-crops-report-brief.pdf> [“NAS Report”]

² See Nordlee J.A., Taylor S.L., Townsend J.A., Thomas L.A., Bush R.K. Identification of a Brazil-nut allergen in transgenic soybeans. *N. Engl. J. Med.* 1996;334:688–692. doi: 10.1056/NEJM199603143341103; <https://www.ncbi.nlm.nih.gov/pubmed/8594427>.

³ *Id.*

⁴ NAS Report, *supra* note 1, at 1.

⁵ World Health Organization, “IARC Monographs Volume 112: evaluation of five organophosphate insecticides and herbicides,” (March 20, 2015), <http://www.iarc.fr/en/media-centre/iarcnews/pdf/MonographVolume112.pdf>

⁶ Maxx Chatsko, “How Much Money Does Monsanto Make From Roundup?” (May 26, 2016), <https://www.fool.com/investing/2016/05/26/how-much-money-does-monsanto-make-from-roundup.aspx>

⁷ See Benbrook, C. M. 2016. Trends in glyphosate herbicide use in the United States and globally. *Environ. Sci. Eur.* 28:3, <https://enveurope.springeropen.com/articles/10.1186/s12302-016-0070-0>.

States to more than double by 2025.⁸ These herbicides have already had significant environmental impacts, perhaps most notoriously driving the monarch butterfly to the brink of extinction.⁹

The rise of GMO crops has also coincided with large companies growing to dominate food production, with “market power in key parts of the agricultural supply chain, including sellers of genetic traits and retail groceries and buyers of meat, poultry, and dairy processing . . . harming competition, consumers, and farmers.”¹⁰ This situation has only gotten worse with the recent approval of three agricultural company mega-mergers.¹¹ As noted in a recent CFA report on the proposed (and since approved) Bayer-Monsanto merger, GMO seed companies operate in a “highly concentrated, vertically integrated tight oligopoly on steroids,” characterized by “bundling of traits, seeds and chemicals, backed up with onerous contractual conditions [that] lock consumers in and competitors out.”¹² Consumers are increasingly seeking alternatives to “big ag” out of concern for their health, rural communities, farmworkers, the environment, animal welfare, or some combination of these or related factors. Given the outsized role that GMO seed companies have played in creating the industrial food model, many consumers reasonably consider purchasing products containing GMOs to be at odds with their ethical values.

Finally, ethical concerns may also extend to a basic discomfort with GMOs. This is particularly true for genetically engineered animals, like the AquAdvantage salmon recently approved by FDA, and currently being sold without disclosure to unwitting Canadian consumers.¹³ Some of these consumers might worry about the unintended consequences of GMO salmon invading the habitat of naturally occurring species. Or they may just generally disapprove of the idea of “playing god” to create novel organisms that could not occur in nature. However a consumer may view GMOs, a transparent food system should allow her to make an informed choice. If GMO proponents want to counter negative perceptions, they should do so by raising public awareness of GMO’s benefits, not by obscuring what products contain GMO ingredients. The alternative is to force a consumer opposed to GMOs to either significantly restrict her diet, or to purchase food that conflicts with her values.

Labels should disclose all foods with GMOs

Because the reasons for wanting to know whether a food contains GMOs are so far-reaching, the final rule should require disclosure whenever a food contains GMO ingredients, even if those

⁸ Mortensen, D., Egan, J. F., Maxwell, B. D., Ryan, M. R. & Smith, R. G. *BioScience* 62, 75–84 (2012).

⁹ Semmens, B. X., D. J. Semmens, W. E. Thogmartin, R. Wiederholt, L. López-Hoffman, J. E. Diffendorfer, J. Pleasants, K. Oberhauser, and O. Taylor. 2016. “Quasi-extinction risk and population targets for the Eastern, migratory population of monarch butterflies (*Danaus plexippus*).” *Scientific Reports* 6:23265, <https://www.nature.com/articles/srep23265> (“Monarchs lay eggs on many species of milkweed (*Asclepias* spp.) that developing larvae require for food. Declines in milkweed abundance are well documented and highly correlated with the adoption of herbicide-tolerant genetically modified corn and soybeans, which now constitute 89% and 94% of these crops, respectively, in the U.S.”).

¹⁰ American Antitrust Institute, <http://www.antitrustinstitute.org/industries/agriculture>.

¹¹ See, e.g. <https://www.theguardian.com/sustainable-business/2016/may/05/monsanto-dow-syngenta-rush-for-mega-mergers-puts-food-security-at-risk>; <http://www.businessinsider.com/bayer-monsanto-merger-has-farmers-worried-2018-4>.

¹² https://consumerfed.org/press_release/new-cfa-report-warns-unprecedented-impact-free-markets-proposed-bayer-monsanto-merger/

¹³ See, e.g. Alex Gillis. “Canadians ate 4.5 tonnes of unlabelled GM salmon without knowing it this past year,” *Maclean’s*, (June 5, 2018), <https://www.macleans.ca/society/environment/canadians-ate-4-5-tonnes-of-unlabelled-genetically-modified-salmon-without-knowing-it-were-you-one-of-them/>

ingredients are highly processed. The GMO disclosure law, Pub. L. 114-216, refers to any food “that contains genetic material that has been modified” in a manner that “could not otherwise be obtained through conventional breeding or found in nature.” As the proposed rule explains, some industry lobbyists have argued that highly refined sugars and oils no longer “contain genetic material” because they “have undergone processes that have removed genetic material such that it cannot be detected using common testing methods.”

This position is unsupported for at least three reasons. First, as the proposed rule notes, studies have indicated that refined oils and sugars do contain “genetic material,” despite going undetected by “common testing methods.” Second, Congress clearly intended for the law to cover “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.”¹⁴ Third, creating a GMO label with such broad exemptions would create trade conflicts with our major trading partners, since most countries with GMO labeling laws do not exempt sugars and oils.¹⁵

Trade conflicts would also result from a final rule that does define genetic engineering to include new technologies, such as CRISPR. Indeed, the international “food code” or *Codex Alimentarius*, to which the World Trade Organization refers in its dispute settlement mechanism, defines genetic engineering to include “fusion of cells beyond the taxonomic family, that overcomes natural, physiological reproductive or recombination barriers, and that are not techniques used in traditional breeding and selection.”¹⁶ A narrow definition would also conflict with existing federal authority. A 2015 Executive Office memorandum defines “biotechnology product” broadly to include gene editing, gene silencing, and other novel technologies.¹⁷ USDA regulations refer to these technologies as methods of genetic engineering.¹⁸ And the National Organic Standards Board prohibits products made with these technologies from being certified organic.

Labels should use terms American consumers understand

For over thirty years, the terms “genetic engineering” and “GMO” have been in popular use by the industry, public, and by regulators in other English-speaking countries with GMO labeling laws. Many companies currently label products that contain GMO ingredients using these familiar terms. The proposed rule, however, relies exclusively on the comparatively unfamiliar term “bioengineered,” and invents a new acronym—“BE”—to displace the common lexicon in use today. This shift would undoubtedly confuse consumers and serve to stymie public awareness of what products contain GMOs. A final rule should use the terms “GMO,” “genetic engineering,” and “genetic modification” in its disclosure requirements.

¹⁴ Statement of the Ranking Member of the Senate Agriculture Committee Senator Debbie Stabenow (D-Mich.), 162 Cong. Rec. S4994 (daily ed. July 12, 2016).

¹⁵ <https://www.centerforfoodsafety.org/ge-map/>

¹⁶ Food and Agriculture Organization of the United Nations, Codex Alimentarius Commission. 2003. Principles for the Risk Analysis of Foods Derived from Modern Biotechnology (CAC/GL 44-2003). Available online at: www.fao.org/input/download/standards/10007/CXG_044e.pdf

¹⁷ Memorandum for Heads of Food and Drug Administration, Environmental Protection Agency, and Department of Agriculture Regarding Modernizing the Regulatory System for Biotechnology Products, Executive Office of the President, July 2, 2015 (July 2015 EOP Memorandum) (online at: https://www.epa.gov/sites/production/files/2016-12/documents/modernizing_the_reg_system_for_biotech_products_memo_final.pdf).

¹⁸ 7 CFR § 205.105 Available online at: <https://www.law.cornell.edu/cfr/text/7/205.105>

The final rule should also instruct companies to employ clear and unequivocal language about whether a product contains GMOs. Statements that a product “may contain” GMOs signal unreliability, and encourage consumers to “tune out.” They are also unwarranted because companies will be required under the regulation to maintain records demonstrating compliance with the rule, and therefore will know with certainty whether a product actually contains GMOs.

Disclosures should be easily accessible

Pub. L. 114-216 contemplates the use of “electronic or digital link disclosure” by food companies, in lieu of a symbol or text disclosure of GMO ingredients. However, the law also directs USDA to determine whether “consumers, while shopping, would not have sufficient access to the bioengineering disclosure through electronic or digital disclosure methods,” and if so, to “provide additional and comparable options to access the bioengineering disclosure.” Last September, AMS published the results of the study it commissioned to examine the feasibility of using QR codes and other forms of electronic disclosure. Among the highlights, nearly a quarter of Americans do not own a smartphone at all. Three quarters are unfamiliar with QR code scanning apps, and 85 percent of those who have attempted to use the apps have “experienced technical challenges.”¹⁹ Clearly, most consumers would not have “sufficient access” to GMO disclosures and so AMS should provide “comparable options.” Requiring consumers to send a text message soliciting a disclosure—the only option proposed by AMS—is not a “comparable option.”

The final rule should require prompt disclosure

Pub. L. 114-216 requires USDA to establish a mandatory disclosure standard and requirements “not later than 2 years after July 29, 2016.” It does not specify the implementation date of the regulations, other than to provide that “in the case of small food manufacturers,” the date should be “not earlier than 1 year after the implementation date for regulations” applicable to larger entities.

AMS now proposes to set the compliance date for a final rule on January 1, 2020, but to allow companies to “use up remaining label inventories” until January 1, 2022. This approach is unfounded and misguided. No evidence suggests that food companies have amassed stockpiles of labels that would require two years to exhaust. Moreover, this provision may give some companies an incentive to create large label inventories where they might not have otherwise. Finally, AMS gives no indication of how it would determine at what point a company “uses up remaining label inventories.” Does this refer to physical labels, or something more intangible, like the investment in a label’s design? The lack of clarity suggests AMS will simply defer to a company’s position.

Thank you for considering these comments.

Sincerely,

Thomas Gremillion
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Consumer Federation of America

¹⁹ AMS. “Study of Electronic or Digital Disclosure” (Sept. 6, 2017), <https://www.ams.usda.gov/reports/study-electronic-or-digital-disclosure>