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Agricultural Marketing Service
United States Department of Agriculture
South Agriculture Building
1400 Independence Avenue, SW, Mail Stop 0201
Washington, D.C. 20250

VIA EMAIL:GMOlabeling@ams.usda.gov

Docket: GMO Disclosure in Labeling, National Bioengineered Food Disclosure Standard

Aurora Organic Dairy (Aurora) appreciates the opportunity to respond to the USDA Agriculture Marketing Service's (AMS) proposed questions on GMO Disclosure in Labeling as it works on the proposed rule.

Aurora Organic Dairy is the leading producer and processor of store-brand organic milk and butter for U.S. retailers. Privately owned and headquartered in Boulder, Colorado, Aurora operates organic dairy, heifer, and calf farms, as well as two organic dairy processing plants. With such a role in this industry, Aurora recognizes the efforts made by AMS to define this policy.

As you know, the National Bioengineered Food Disclosure Standard was enacted on July 29, 2016. AMS has two years to establish a national standard and the procedures necessary for implementation. Please find below a general public policy position of the company as well as answers to two of the 30 questions for consideration by interested stakeholders. We also have attached two congressional letters because (1) Aurora was intricately involved at key stages on Capitol Hill as lawmakers considered provisions defining and interpreting what "non-GMO" means and (2) Aurora firmly believes that the final mandatory GMO food disclosure guidance should expressly state that for products to be lawfully labeled "non-GMO" the NOP rules and regulations must be met.

Aurora stands ready to assist the AMS with its analysis of the current organic dairy market as well industry trends and developments that have led the company to these recommendations.

Thank you again for the opportunity to respond to AMS's proposed rule questions on GMO Disclosure in Labeling.

Respectfully submitted,

Scott McGinty
President

I. Answers to Proposed Rule Questions Under Consideration

Question 5: Although the Law states that the definition of bioengineering shall not affect any other definition, program, rule, or regulation of the Federal government, could there be potential areas of confusion between the definition of bioengineering as used in the Law and other similar terms used by the Federal government? If so, what are the potential remedies that could be added to this regulation to alleviate any confusion between this definition and others by the Federal government? (Sec. 292(b))

Aurora Response: *GMO food disclosure regulations must include language that explicitly protects the USDA organic regulations from any modifications as a result of the GMO food disclosure rule*

Aurora thanks USDA for clarifying in policy that the rules for bioengineered food disclosure **will not** require that modifications be made to the USDA organic regulations. The conditions expressed in USDA's Policy Memorandum entitled, "Consistency with the AMS National Organic Program" should also be clearly stated in the final GMO food disclosure regulations.

Over the past 15 years, USDA's NOP has developed an extensive body of federal regulations relating to GMOs. This includes USDA policy statements, instructions to certifiers and certified operations, and USDA fact sheets/educational materials for the public, all of which are available on the NOP website. Furthermore, the federal advisory board that advises the Secretary of Agriculture in setting organic standards (National Organic Standards Board) just completed three years of work through a transparent and public process and unanimously passed a recommendation[2] to NOP on "excluded methods terminology" further clarifying the methods that are prohibited under the organic regulations.

As AMS moves forward and implements Pub. L. 114-216, it is critical that the language addressing consistency with certain laws, found in section 299 (f)(2), is clearly interpreted and translated through rulemaking in such a way that will protect the definitions and practices that are currently established under the NOP organic regulations and any USDA NOP rulemaking or guidance in process.

Section 299 (f)(2) of Pub. L. 114-216 states:

> "the Secretary shall consider establishing consistency between the national bioengineered food disclosure standard established under this section and the Organic Foods Production Act of 1990 (7 U.S.C. 6501 et seq.) and any rules or regulations implementing that Act."

Contrary to the intent, there is concern that this provision may actually lead to a revision to the organic regulations in order to bring consistency with the standards established under Pub. L. 114-216. As clarified through USDA's Policy Memorandum on "Consistency with the AMS National Organic Program," this is not the intent and should not be interpreted as such.

[2] NOSB Materials/GMO Subcommittee Proposal: Excluded Methods Terminology (August 30).

The AMS policy was written to ensure that any new proposed regulations or specifications of Pub. L. 114-216 complies with its policy. Central to avoiding conflict and protecting the organic standards, the policy states:

> When proposing standards for national bioengineered food disclosure program, AMS' policy will be as follows:
> - No certified organic products will require disclosure as bioengineered; and
> - No proposed rules for bioengineered food disclosure will require that modifications be made to the USDA organic regulations.

The definition and prohibition on excluded methods is well established in the regulations of NOP and the organic industry has grown alongside these requirements from its $3 billion in annual sales in 2001 to $43 billion today. To avoid extensive disruption and economic hardship within the organic industry and maintain consumer confidence, it is critical that USDA ensures that the rules for mandatory GMO food disclosure adopt the language included in the AMS policy in order to ensure that no proposed rules for bioengineered food disclosure will require that modifications be made to the USDA organic regulations.

Furthermore, P.L. 114-216 and the AMS National Organic Program should be consistent as far as what products can be labelled "non-GMO." As described above, the NOP has developed and established a comprehensive and thorough understanding of what "non-GMO" means and the final mandatory GMO food disclosure guidance should expressly state that for products to be lawfully labeled "non-GMO" the NOP rules and regulations must be met. Without consistent definitions of "non-GMO" or without one definition of "non-GMO" under federal law, the USDA organic seal will be undermined and consumers will inevitably be misled. In addition, huge financial investments will be eliminated overnight and the economic playing field will no longer be level because the organic industry will no longer be able to rely on the inherent value "non-GMO" label.

Question 7: How should AMS craft language in the regulations acknowledging that animals consuming bioengineered feed are exempt from the disclosure requirements as bioengineered solely because they fed on bioengineered feed? (Sec. 293(b)(2)(A))

Aurora Response: The final rule should clearly state that products exempt from disclosure, such as milk or other dairy or livestock products from animals fed bioengineered feed, do not qualify for a "non-GMO" label claim. To use the "non-GMO" label these products must meet a verification standard consistent with the "non-GMO" rules and regulations developed, established and enforced by the NOP.

The USDA organic label certifies that a product has been made through a ***process*** in which all organic production standards (such as soil fertility requirements, pest management practices, contamination prevention measures and livestock production practices, including grazing, and inputs) have been followed. This means that excluded methods (GMOs) are prohibited at all stages of the process and extends to inputs including livestock feed, that must be certified organic. More explicitly, the term "non-GMO" when applied to certified organic milk, meat and eggs means that the animals have not been fed genetically modified feed because the organic regulations prohibit the use of GMOs in the production of organic agricultural products. Compliance is verified

through the robust and auditable NOP certification process that includes periodic testing for prohibited substances such as pesticides, heavy metals and GMOs.

Organic certification is sufficient to make a claim regarding the absence of bioengineering in the food. However, products that do not require mandatory disclosure as bioengineered foods, such as milk from cows fed genetically modified feed, should not automatically qualify for absence claims because the food is not required to bear a bioengineered disclosure.

Section 294 (c) of Pub. L. 114-216 states:

> A food may not be considered to be 'not bioengineered', 'non-GMO', or any other similar claim describing the absence of bioengineering in the food solely because the food is not required to bear a disclosure that the food is bioengineered under this subtitle.

Aurora strongly supports this provision and the final regulations should clearly apply this condition to products derived from animals that have consumed bioengineered feed. To allow absences claims on products from animals fed genetically modified feed would be inconsistent with the USDA organic regulations and it would be inconsistent with the USDA Food Safety and Inspection Service (FSIS) policy on approving non-GMO claims on meat, poultry and egg products. As a policy matter and in response to Pub. L. 114-216, FSIS will only approve "negative claims" for meat, poultry and egg products that do not contain bioengineered ingredients or that are derived from livestock that do not consume bioengineered feed and that contain the terms "genetically modified organism" or "GMO".

The legislative history is very instructive on this specific issue. H.R. 1599, the Safe and Accurate Food Labeling Act of 2015, was the leading House bill. On July 12, 2015, the House Agriculture Committee passed an amended version of H.R. 1599, creating a voluntary GMO food-labeling program, as well as a voluntary non-GMO food-labeling program. The bill included the following language in Section 291B(a)(2) when creating the voluntary non-GMO program:

> "In the case of a covered product derived from livestock that is marketed in the United States for human consumption, covered product and the livestock, products consumed by such livestock, and products used in processing the products consumed by such livestock shall be produced without the use of products derived from genetic engineering."

The Committee Report, H. Rept. 114-208, explains further:

> "The legislation requires the Secretary to establish national standards for labeling non-genetically engineered food. In the case of covered products consumed by or derived from livestock, the Committee intends that a covered product will not be labeled as a covered product produced without the use of genetic engineering unless livestock, feed, feed ingredients, feed additives (including pharmaceuticals) and any other products consumed by livestock are produced without the use of products derived from genetic engineering. Additionally, the Committee fully intends that products used in the

> processing of covered agriculture products derived from livestock are produced without the use of products derived from genetic engineering. Exceptions to this provision include those items found on the National List established under Section 2118 of the Organic Foods Production Act of 1990 (7 U.S.C. 6517)."

This is an important provision to organic farmers and food producers and for the millions of consumers who choose organic every day. They all recognize, unequivocally, that USDA Certified Organic products qualify for non-GMO claims in the market place. Those provisions safeguard USDA certified organic as the gold standard for transparency and non-GMO status. Consistent with law, the final rule must state that products exempt from mandatory disclosure as bioengineered foods, such as milk from cows fed genetically modified feed, do not qualify for a non-GMO claim. To do otherwise would be inconsistent with the USDA organic regulations and with the USDA Food Safety and Inspection Service (FSIS) policy and would ultimately mislead consumers and create confusion in the marketplace.

II. Aurora Public Policy position

Lawful Use of "non-GMO" on Packaging

Aurora was intricately involved in the congressional deliberations establishing a federal mandatory GMO labeling law and program. We were always concerned about the ability of conventional dairy marketers to label their products as "non-GMO" even if the animal consumed feed, a feed ingredient or artificial growth hormone that was produced with the support of genetic engineering. Such a claim would be inconsistent with the meaning of non-GMO production practices required under the USDA's National Organic Program and directly misleading to consumers who rely on the claim to mean GMO's were not used in the production of the food.

As you may know, the USDA National Organic Program (NOP) prohibits the use of GMOs in organic food production. Relying on a specific provision in the new law, the USDA issued guidance to industry that the requirements of the Organic rule "automatically" permit organic products to bear a non-GMO claim. Because the non-GMO production requirements under the NOP prohibit the use of GMO feed or other GMO animal inputs, consumers expect that non-GMO livestock products informs them about the entire production system, not simply the content of the final product.

The USDA requires approved organic system plans to ensure producers follow the required practices and enforces compliance with those plans. Organic dairy businesses spend billions of dollars each year to comply with those federal requirements, including non-GMO production practices, under penalty of fines and imprisonment for fraudulent practices. This is why certified organic milk products assure the consumer of how the product was produced and lawfully bears a non-GMO claim. Laws and regulations should not unfairly give conventional milk a competitive advantage to use the same "non-GMO" claim without the same investment, compliance and certification.

Today, this is already causing harm in the marketplace. The absence of clear non-GMO milk labeling regulations is enabling conventional dairy products to use a non-GMO claim on their packaging, providing them a huge and unjust competitive advantage and misleading consumers who do not know conventional milk may be produced with GMO feed or other bioengineered animal inputs.

Legislative History

To educate lawmakers and policy stakeholders, the House Agriculture Committee, the House Energy and Commerce Committee, and the Senate Agriculture Committee held hearings in preparation for establishing a new federal GMO labeling program.

H.R. 1599, the Safe and Accurate Food Labeling Act of 2015, was the leading House bill. On July 12, 2015, the House Agriculture Committee passed an amended version of H.R. 1599, creating a voluntary GMO food-labeling program, as well as a voluntary non-GMO food-labeling program. The bill included the following language in Section 291B(a)(2) when creating the voluntary non-GMO program:

> "In the case of a covered product derived from livestock that is marketed in the United States for human consumption, covered product and the livestock, products consumed by such livestock, and products used in processing the products consumed

by such livestock shall be produced without the use of products derived from genetic engineering."

Additionally in the committee-passed bill, the House Agriculture Committee bill included legislative language aligning the proposed labeling program with the National Organic Program:

"SEC. 202. REGULATIONS.

In promulgating regulations to carry out the amendments made by section 201, the Secretary of Agriculture shall—

(2) to the greatest extent practicable, establish consistency between the certification programs established under subtitle E of the Agricultural Marketing Act of 1946 (as added by section 201 of this Act), the organic certification program established under the Organic Foods Production Act of 1990 (7 U.S.C. 6501 et seq.), and other voluntary labeling programs administered by the Secretary…"

The Committee Report, H. Rept. 114-208, explains further:

"The legislation requires the Secretary to establish national standards for labeling non-genetically engineered food. In the case of covered products consumed by or derived from livestock, the Committee intends that a covered product will not be labeled as a covered product produced without the use of genetic engineering unless livestock, feed, feed ingredients, feed additives (including pharmaceuticals) and any other products consumed by livestock are produced without the use of products derived from genetic engineering. Additionally, the Committee fully intends that products used in the processing of covered agriculture products derived from livestock are produced without the use of products derived from genetic engineering. Exceptions to this provision include those items found on the National List established under Section 2118 of the Organic Foods Production Act of 1990 (7 U.S.C. 6517)."

When the House Agriculture Committee passed this version of the bill, Aurora sent a letter to Chairman Mike Conaway in support of H.R. 1599. (See attachment.)

The House Rules Committee then incorporated language into H.R. 1599 by a Manager's Amendment that passed the full House. That Manager's Amendment included an objectionable provision that was a direct contradiction to the critical provisions discussed above. For this reason, Aurora rescinded its support of H.R. 1599. (See attachment.)

The Senate then passed legislation creating a federal mandatory GMO labeling program in the United States, which became law. The Senate took a completely new approach and did not create a non-GMO labeling program at all. Included in the Senate bill:

"A food may not be considered to be 'bioengineered', 'non-GMO', or any other similar claim describing the absence of bioengineering in the food solely because the food is not required to bear a disclosure that the food is bioengineered under this subtitle."

The Senate language also states that there should be consistency with the Organic Foods Production Act of 1990 in any rules or regulations implementing that Act.

The Organic Trade Association described the Senate bill as:

> "a federal labeling bill that not only requires disclosure of GMO ingredients, but also includes important provisions that are excellent for organic farmers and food makers – and for the millions of consumers who choose organic every day -- because they recognize, unequivocally, that USDA Certified Organic products qualify for non-GMO claims in the market place. Those provisions safeguard USDA certified organic as the gold standard for transparency and non-GMO status… Important clarifying additions include that products that are not required to label (such as products of animals fed GMO feed) do not automatically qualify for non-GMO claims in the marketplace. This bill reinforces Organic as the original non-GMO market claim and assures consumers that the USDA organic seal is the gold standard for consumers looking to avoid GMO's, toxic pesticides, and so much more." (See attachment.)

Conclusion

Transparency has always been a foundational principle for food labeling. We are concerned that consumers will be confused by the use of "non-GMO" and "non-GMO ingredients" on a food label. As this GMO labeling law is implemented, we hope that all companies faced with the choice of how to disclose non-GMO ingredients will be subject to the same rules as required by the National Organic Program.