



August 23, 2017

The Honorable Sonny Perdue
Secretary of Agriculture
U.S. Department of Agriculture (USDA)
1400 Independence Ave., S.W.
Washington, DC 20250

RE: Proposed Rule Questions under Consideration for GMO Disclosure and Labeling
<https://www.ams.usda.gov/rules-regulations/gmo-questions>

Dear Secretary Perdue:

National Co+op Grocers (NCG) represents 146 community-owned retail food co-ops located in 38 states, with over \$2 billion in annual sales and over 1.3 million consumer-owners. We support consumers' right to information, including product labeling for genetically engineered foods, so that consumers can make informed choices.

NCG thanks USDA for requesting stakeholder input, via the 30 questions posed by the Agricultural Marketing Service (AMS), to inform the implementation of the National Bioengineered Food Disclosure Standard by the mandated July 2018 deadline. We look forward to providing additional comments during the formal rulemaking process.

1. What terms should AMS consider interchangeable with 'bioengineering'? (Sec. 291(1))

In order to minimize consumer confusion, AMS should recognize a limited number of alternative terms: "genetic engineering," "biotechnology," "genetic modification," "genetically modified organism," "GMO" and "GM." In particular, consumers are highly familiar with the term "GMO," and we therefore urge AMS to authorize this acronym as interchangeable with "bioengineering."

Research done by Campbell Soup Company shows that consumer preference is for "GMO." As Campbell's senior manager of consumer and consumer insights Katie Cleary stated:

"Campbell has tested nine labels related to GE food ingredients in the past few months and found individuals viewed use of terms like 'bioengineered or genetically engineered' confusing ... The feedback has been very consistent in our research that the preferred language is GMO."¹

Additionally, the final rule should allow the term "non-GMO" and other similar phrases as suitable shorthand for "not produced using genetic engineering (or bioengineering)." Examples of similar

¹ Pegg JR. 2016. Campbell Soup finds consumers prefer clear GMO labeling. *Food Chemical News* (Sept. 8, 2016) At: www.agra-net.com/agra/food-chemical-news/food-safety/packaging/campbell-soup-finds-consumersprefer-clear-gmo-labeling-526281.htm.



phrases include “produced without GMO ingredients,” “made without the use of GMOs” and “contains non-GMO ingredients only.”

Terminology should be compatible with the standards and guidelines developed by the international community through Codex Alimentarius.

2. Which breeding techniques should AMS consider as conventional breeding? (Sec. 291(1)(B))

According to USDA, conventional farming is described as the “use of seeds that have been genetically altered using a variety of traditional breeding methods, excluding biotechnology, and are not certified as organic.”²

The law urges harmonization of the disclosure standard with USDA Certified Organic standards. AMS should therefore differentiate between conventional breeding and biotechnology by using the National Organic Standards Board’s definition of “modern biotechnology,” which is the same definition used by FDA and Codex Alimentarius. This widely used definition would require the disclosure of organisms developed using gene editing and gene silencing techniques, which include but are not limited to sequence-specific nucleases, meganucleases, zinc finger nuclease, CRISPR-Cas system, TALENs, oligonucleotide directed mutagenesis RNAi, RNAi pesticides, and RNA-dependent DNA methylation.

Anything less than a broad interpretation of “bioengineering” accounting for future developments in biotechnology would fail to harmonize the law with existing standards, contributing to confusion in the international marketplace. A too narrow interpretation would also undermine clear legislative intent and contradict USDA General Counsel Jeffrey Prieto’s legal interpretation. In a colloquy on July 12, 2016, Ranking Member of the Senate Agriculture Committee Senator Debbie Stabenow (D-Mich.) stated:

“the bill gives USDA broad authority to periodically amend its labeling regulations to ensure that there are no new scientific biotechnology methods that may escape any overly prescriptive statutory definition of biotechnology.”³

USDA’s General Counsel Jeffrey M. Prieto has stated that it is well within USDA’s authority under Pub. L. 114-216 to broadly interpret the definition of bioengineering. In a letter to Ranking Member Stabenow on July 1, 2016, Prieto wrote:

“Section 291(1) of the Senate bill provides authority to include food in the national disclosure program, including products of certain gene editing techniques. This would include novel gene editing techniques such as CRISPR when they are used to produce plants or seeds with traits that could not be created with conventional breeding techniques. In addition, the definition provides authority to include RNAi techniques that have been used on products such as the non-browning apple and potato.”⁴

² United States Department of Agriculture. “USDA Coexistence Fact Sheets: Conventional Farming.” Available at <https://www.usda.gov/sites/default/files/documents/coexistence-conventional-farming-factsheet.pdf>.

³ 162 Cong. Rec. S4994 (daily ed., July 12, 2016)

⁴ 162 Cong. Rec. S4994 (daily ed. July 12, 2016).



AMS should establish a clear mechanism under the disclosure standard that requires the inclusion of new genetic engineering techniques, as they are developed, to ensure that companies and consumers understand the full scope of the disclosure standard.

3. Which modifications should AMS consider to be found in nature? (Sec. 291(1)(B))

The disclosure law is intended to inform consumers, and should avoid creating misleading loopholes. AMS should define “modifications... found in nature” narrowly. NCG supports more detailed comments provided by Consumer Reports on this question.

4. Will AMS require disclosure for food that contains highly refined products, such as oils or sugars derived from bioengineered crops? (Sec. 291(1)(A))

NCG strongly urges AMS to require disclosure for food that contains highly refined products, such as oils or sugars, derived from bioengineered crops. Anything less would exclude a significant portion of the market from disclosure requirements, undermining both the legislative authority of Pub. L. 114-216 and reasonable consumer expectations.

Although currently available testing methods cannot always detect genetic material in refined foods, genetic material may still be present and, as testing methods advance, may be detectable by more sensitive tests in the future. Consumers want access to information regarding which foods are produced using genetic engineering, and this information should not be based on the limitations of current testing methods.

Both Senator Stabenow and General Counsel Prieto have stated that the law grants USDA the authority to require disclosure for refined foods. NCG supports more detailed comments from Just Label It and Organic Trade Association on this 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))

Consumer confidence in the organic label relies upon a transparent and public process to develop regulations, including those pertaining to bioengineering. The conditions expressed in USDA’s “Consistency with the AMS National Organic Program” policy memorandum dated September 19, 2016 should be clearly stated in the final GMO food disclosure regulations:

- 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.

NCG supports Organic Trade Association (OTA) comments pertaining to this question.



6. Meat, poultry, and egg products are only subject to a bioengineered disclosure if the most predominant ingredient, or the second most predominant ingredient if the first is broth, stock, water, or similar solution, is subject to the labeling requirements under the Federal Food, Drug, and Cosmetic Act. How will AMS determine the predominance of ingredients? (Sec. 292(c))

The intent of the law was not to exempt animals, and any products derived from such animals, that have been genetically engineered themselves. It is critical that AMS include this distinction in its proposed rule. NCG supports Just Label It (JLI) comments pertaining to this question.

7. How should AMS craft language in the regulations acknowledging that the Law prohibits animal products from being considered bioengineered solely because the animal consumed feed products from, containing, or consisting of a bioengineered substance? (Sec. 293(b)(2)(A))

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 allow absences claims on products from animals fed genetically modified feed would be inconsistent with the USDA organic regulations and USDA Food Safety and Inspection Service (FSIS) policy, and would ultimately mislead consumers, creating confusion in the marketplace.

8. What is the amount of a bioengineered substance present in a food that should make it be considered bioengineered? (Sec. 293(b)(2)(B))

As noted in response to question four, the ability to detect the presence of bioengineered content should not serve as the basis for disclosure. Consumers have an interest in knowing whether or not a product is *produced with genetic engineering* for a range of environmental, socio-economic, religious and other reasons, not merely whether or not a product contains a detectable level of GMO material.

If the final rule stipulates a threshold amount, that threshold should be 0.9% on a per ingredient basis, which is consistent with the threshold used by the European Union, a major U.S. trading partner, and existing non-GMO consumer labels such as the Non-GMO Project Verified label which is found on more than 40,000 products with annual sales of \$20 billion.

Such disclosure should occur on the ingredient list. One easy way to do this is to use an asterisk symbol (*) after each ingredient in the ingredient list that is bioengineered and then at the end of the ingredient list note that * = “genetically engineered” or “genetically modified.”

9. Should AMS consider more than one disclosure category? (Sec. 293(b)(2)(D))

The disclosure should include a clear presence or derived from claim (e.g. “produced” or “partially produced”) rather than the ambiguous statement “may contain.” The disclosure should provide ingredient-level information and occur on the ingredient panel.

10. What other factors or conditions should AMS consider under which a food is considered a bioengineered food? (Sec. 293(b)(2)(C))

NCG supports the development of a process to help stakeholders determine whether a food is subject to disclosure. This process should include a rubric to help stakeholders, food manufacturers and the



public understand how disclosure requirements are triggered, as well as a publically available and searchable online database that includes the full list of determinations, with information provided as to the reason(s) for why a food product does or does not meet the disclosure requirement under the standard.

Additionally, USDA should establish a clear mechanism under the disclosure standard that requires the inclusion of new genetic engineering techniques, as they are developed, to ensure that companies and consumers understand the full scope of the disclosure standard.

11. Could AMS consider whether a type of food is considered a bioengineered food under the determination process? (Sec. 293(b)(2)(C))

People with medical conditions, dietary restrictions, or those utilizing dietary supplements deserve the same right to know as the general public. Medical foods and dietary supplements, which are generally considered foods by the FDA, should not be exempt from disclosure.

12. If a manufacturer chooses to use text to disclose a bioengineered food, what text should AMS require for a text disclosure? (Sec. 293(b)(2)(D))

NCG strongly urges manufacturers to choose on-package text with ingredient-level information. AMS should allow a limited range of flexibility in terms of the text disclosure language.

While NCG prefers a final rule that does not stipulate a threshold amount, The Consumer Protection Rule 121 from the State of Vermont could serve as a potential model, and many manufacturers are already labeling product accordingly.

In Vermont's regulations, "*genetically engineered*" could be used on a product derived from a single source that was bioengineered, such as a genetically engineered apple or salmon filet. "*Produced with genetic engineering*" could be used on a multi-ingredient product where 75% or more of the ingredients in the product (by weight) derived from bioengineered sources, while "*partially produced with genetic engineering*" could be used on a multi-ingredient product where less than 75%, but at least 0.9%, of the ingredients in the product (by weight) are derived from bioengineered sources.

The phrase "*may be produced with genetic engineering*" should not be allowed. The first three phrases are informative, while the last one is not.

13. If a manufacturer chooses to use a symbol to disclose a bioengineered food, what symbol should AMS require for disclosure? (Sec. 293(b)(2)(D))

NCG strongly encourages AMS to require one form of disclosure: an on-package text statement. If AMS chooses to utilize a symbol as a disclosure mechanism, the symbol should be clear and straightforward, such as a circle with the letters "GMO" in the center. Consumers readily recognize the acronym "GMO" as synonymous with genetic engineering or bioengineering. AMS should develop criteria for placement such that the symbol is placed near other required disclosures, is prominently sized, and is easily recognizable with a sharp contrast between the symbol and the background space. Anything else would require considerable resources to educate the public on the label and what it means. If AMS decides to allow a symbol for disclosure, NCG recommends consumer focus groups as a means of better understanding what symbols could be easily recognized by consumers.



14. If a manufacturer chooses to use an electronic or digital link to disclose a bioengineered food, what requirements should AMS implement for an electronic or digital link disclosure? (Sec. 293(b)(2)(D))

NCG does not view QR codes or other digital options as adequate disclosure. On package, ingredient-level text disclosure is the most transparent and accessible means to communicate to consumers that a product has been produced using genetic engineering.

NCG strongly discourages digital disclosure; however, if manufacturers are permitted to use the digital disclosure, the final rule must include safeguards that ensure digital disclosures consistently scan every time, work in all conditions, and are easily accessible for consumers who don't have smartphones. Digital disclosures must link to a page that clearly and prominently presents the bioengineered food disclosure, with ingredient level information, and without any marketing or promotional content.

If AMS permits the digital disclosure option, it has been suggested that retailers could be required to install in-store scanners. As retailers, NCG strongly advises that this would in no way overcome the significant disadvantages for consumers, in terms of nondiscriminatory access and convenience, associated with digital disclosure. It would only add another unintuitive step – and therefore another layer of consumer confusion – to consumers' ability to know whether or not a product has been produced using genetic engineering. Further, in the same way that the digital option unfairly discriminates among consumers, requiring in-store scanners would significantly disadvantage smaller retailers for which it would be a technical and financial burden, as well as stores in rural areas without access to reliable internet or cellular services. Consumers should be able to simply look at the package to find this information.

15. Should AMS specify in the regulations the type of electronic or digital disclosure manufacturers, e.g. QR code, can use to disclose bioengineered food? What steps should AMS take if an electronic or digital disclosure method becomes obsolete? (Sec. 293(b)(2)(D))

As noted above, NCG strongly urges AMS to reject the digital disclosure option. If AMS moves forward with the digital option, the final rule must either specify which forms of digital disclosure are allowed, or the rule must apply to all forms of potential digital or electronic disclosure. As digital technology changes, the regulations will need to be updated regularly through formal rule-making with opportunities for public comment.

16. What kind of text, symbol, or electronic or digital disclosure should AMS require for bioengineered food that is not purchased from a grocery store shelf, such as food for sale in bulk (such as fresh produce in a bin or fresh seafood at a fish counter), in a vending machine, or online? (Sec. 293(b)(2)(D))

As noted above, NCG views text disclosure as the most transparent and accessible means to communicate to consumers that a product has been produced using genetic engineering. Digital disclosures are inconvenient and impractical. For example, smartphones are unlikely to quickly or reliably scan QR codes placed on signage for GE salmon sold behind glass at a fish counter because the scanner may not be able to adjust for the glass surface's reflection or the angle at which the QR code is displayed. On the other hand, consumers can quickly and easily read signage that states "*genetically engineered.*"



17. & 18. The Law offers special provisions for disclosure on very small or small packages. How should AMS define very small or small packages? (Sec. 293(b)(2)(E)) What are the reasonable disclosure options AMS should provide for food contained in very small or small packages? (Sec. 293 (b)(2)(E))

NCG does not have specific comments at this time.

19. & 20. How should AMS define small food manufacturers? (Sec. 293(b)(2)(F)) For disclosures by small food manufacturers, what is the appropriate language indicating that a phone number provides access to additional information? (Sec. 293(b)(2)(F)(ii)(I))

NCG does not have specific comments at this time.

21. The Law excludes restaurants and similar retail food establishments from disclosure requirements. How should AMS define similar retail food establishment to exclude these establishments from the requirements of the regulation? (Sec. 293(b)(2)(G)(i))

NCG does not have specific comments at this time.

22. How should AMS define very small food manufacturers to exclude these manufacturers from the requirements of the regulation? (Sec. 293(b)(2)(G)(ii))

NCG supports Congressional intent to exempt “cottage foods” while not creating an overly broad exemption.

23. Is there other equivalent on-package language that AMS should consider to accompany an electronic or digital disclosure besides “Scan here for more food information”? (Sec. 293(d)(1)(A))

As noted above, NCG opposes digital disclosure. However, if AMS allows digital disclosure, such disclosure must satisfy the intent of the statute, which is to provide consumers with GMO information, not food information broadly. Therefore, accompanying language should be “*Scan for GMO information.*”

24. How should AMS ensure that bioengineered food information is located in a consistent and conspicuous manner when consumers use an electronic or digital disclosure? (Sec. 293(d)(2))

As noted above, NCG views text disclosure as the most transparent and accessible means to communicate to consumers that a product has been produced using genetic engineering. NCG views digital disclosure as inconvenient and impractical for use in a retail setting, and discriminatory towards people without smartphones or reliable internet access.

If AMS permits digital disclosure, and if manufacturers choose this option despite its many drawbacks, the final rule must require that the GMO disclosure be located, in a consistent and conspicuous manner, on the first landing page following scanning or entering the URL. The disclosure must appear in a font that is large enough to be easily seen, and must provide ingredient-level information via a presence or derived from claim, not a “*may contain*” claim. Importantly, the product information page must omit any marketing or promotional material.



25. How should AMS ensure that an electronic or digital disclosure can be easily and effectively scanned or read by a device? (Sec. 293(d)(5))

NCG does not support digital disclosure. If digital disclosure is permitted, AMS will need to establish rules governing QR code design and performance, as well as rules governing any other type of digital disclosure, so that digital disclosure provides consumer information as quickly and reliably as on-package text.

NCG supports Just Label It (JLI) comments pertaining to this question.

26. – 29. What types of records should AMS require to be maintained to establish compliance with the regulations? (Sec. 293(g)(2)). How should AMS obtain information related to potential non-compliance with these regulations? Is there information USDA should request prior to conducting an examination of non-compliance? (Sec. 293(g)) What are the rules of practice for a hearing? (Sec. 293(g)(3)(B)) How should AMS make public the summary of any examination, audit, or similar activity? (Sec. 293(g)(3)(C))

NCG supports Just Label It (JLI) and Consumer Reports' comments pertaining to this question.

30. What should the requirements for imports into the United States of products covered by the Law/regulation be? (Sec. 294(a))

All products offered for sale in the U.S. should be required to meet the requirements of the new GMO disclosure law. AMS should utilize definitions and guidelines consistent with Codex Alimentarius which are recognized by the World Trade Organization.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink that reads "Robynn Shrader". The signature is fluid and cursive, with a large loop at the beginning.

Robynn Shrader
Chief Executive Officer
National Co+op Grocers