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July 17, 2017

U.S. Department of Agriculture
Agricultural Marketing Service
1400 Independence Avenue SW
Washington, DC 20250

Submitted via GMOlabeling@ams.usda.gov.

Re: National Bioengineered Food Disclosure Standard; Proposed Rule Questions Under Consideration

Dear Secretary Perdue:

Food & Water Watch appreciates the opportunity to comment on the questions posed by the Agriculture Marketing Service (AMS) as part of the process of rulemaking on the National Bioengineered Food Disclosure Standard. Food & Water Watch members and supporters are extremely interested in mandatory disclosure of genetically engineered (GMO) foods and ingredients and were active in states across the country to advocate for mandatory labeling laws at the state level. Last year's passage of the law that is triggering this rulemaking preempted state labeling laws, including one that had gone into effect in Vermont. Because consumers can no longer get mandatory labeling under state laws, it even more critical that AMS create disclosure standards at the federal level that are clear, accessible to all shoppers and cover the widest variety of products possible.

In general, we urge AMS to require on-package or on-shelf labeling, rather than digital codes or other options that require consumers to use a phone or other device to seek out the information. Additionally, we urge AMS to require disclosure of all genetically engineered ingredients and to use a definition of "bioengineered" that is consistent with international and other U.S. standards and captures new and emerging techniques.

We urge the USDA to make public the input it receives in response to these questions.

In addition to these general principles, we offer the following more specific answers to the questions posed by USDA.

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

AMS should consider a limited number of terms to be interchangeable, including "genetically engineered, "GE" "genetically modified," GMO and "modern biotechnology." These terms are all recognized by some other part of the federal government, including the Food and Drug Administration and USDA's Food Safety and Inspection Service.

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

We urge AMS to adopt the approach used by the National Organic Standards Board (NOSB) in defining conventional breeding. The NOSB defines conventional breeding as consisting of various techniques that do not include techniques of modern biotechnology, as defined by the NOSB, FDA, Codex Alimentarius Commission and the Cartagena Protocol. Using these definitions, gene editing techniques would be techniques of modern biotechnology and not techniques of conventional breeding.

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

When evaluating which modifications can be found in nature, we urge AMS to consider the entire genetic sequence that has been altered to create or insert the trait in a bioengineered crop or organism, rather than just the trait itself. Additionally, if the presence of the trait is the result of human intervention in a laboratory setting using techniques of modern biotechnology, the fact that a trait may be found elsewhere in nature is not sufficient to exempt out this product from disclosure requirements.

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

AMS should require disclosure for food containing highly refined products derived from bioengineered crops. Regardless of the limitations in current detection technology, consumers are interested in whether techniques of bioengineering have been used to produce the food products they buy. Therefore, these highly refined products of bioengineering should be labeled so that consumers will have this information when they are making buying decisions. Whether or not highly refined ingredients retain detectable amounts of genetic material does not change the fact that bioengineering techniques were used to produce them. That is what should trigger disclosure.

This question was debated extensively before the passage of the law that is driving this rulemaking, and members of Congress as well as USDA's own counsel stated that the law as written would require these highly refined products to be covered by disclosure requirements.

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))

If there are potential areas for confusion around terminology, the best way to alleviate them would be for AMS to adopt terms that are already in use by other parts of the federal government on this issue, as discussed in question 1. In particular, we urge you to adopt the definitions used by the FDA and NOSB.

In addition to terminology, we want to be very clear that we believe the law requires no changes to the USDA's organic regulations and that no USDA certified organic products will require disclosure as bioengineered. This is outlined in a policy memo from September 19, 2016 entitled "AMS Bioengineered Foods Disclosure Program – Consistency with the AMS National Organic Program."

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))

While we understand that the law prohibits animal products from requiring disclosure solely because of the animal's feed, we urge AMS to make very clear in any rulemaking that food products from animals which are themselves bioengineered in any way should be covered by disclosure requirements. Also, we urge AMS not to allow animal products derived from animals that consumed feed containing bioengineered ingredients to be labeled as a non-GMO or non-bioengineered product.

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))

We urge AMS to consider the threshold already established under the Vermont labeling law, by international trading partners including the European Union (EU) and by major non-GMO labeling certifications, which is 0.9%. This is widely accepted as the level above which disclosure requirements should apply. AMS should require disclosure for any bioengineered ingredient in a food product that exceeds 0.9% on the ingredient list.

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

Consumers are interested in whether bioengineering techniques were used to produce the products they consume regardless of how the government characterizes the uses of the product. Therefore, we urge AMS not to exclude dietary supplements or medical foods from disclosure requirements.

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))

AMS should require manufacturers to use the terms “genetically engineered,” “produced with genetic engineering,” or “partially produced with genetic engineering.” AMS should not allow firms to use the phrase “may be produced with genetic engineering” because the vague nature of this phrase does not give consumers useful information when they are making buying decisions.

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))

A symbol for disclosure should contain the phrase “genetically engineered” or “genetically modified” or the acronyms GE or GMO. AMS should require any symbol to appear in a reasonably large font prominently on the package or shelf label. In addition to the symbol, we think that any ingredient which is derived from a bioengineered source should be identified as such on the ingredient list.

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)

We strongly urge AMS not to allow manufacturers to use electronic or digital links or codes for disclosure. Anything other than an on-package or on-shelf label will leave huge numbers of consumers who cannot access the technology necessary to use these digital tools without any information when they shop.

Studies show that approximately half of low-income people and residents of rural areas do not own smartphones. Two-thirds of the elderly do not own smartphones. In fact only 64 percent of Americans own a smart phone. Electronic disclosure is inherently discriminatory against major portions of the population who have no way to easily access this information while shopping.

In addition, electronic labeling disclosures place an undue burden on the consumer and greatly impede access to information. In many areas, access to the internet is non-existent or intermittent. Even for shoppers who have smartphones and are shopping in stores with internet access, electronic or digital disclosures are burdensome and impractical. Shoppers are often on tight timelines, perhaps with children in tow, and may not have the time necessary to scan each food item they purchase and read information on a website. Shoppers already expect that they can read a label for critical product details so they can make an informed purchase and they should be able to do so for this information as well.

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))

For food sold in a bin or behind a counter, text or symbol disclosure about bioengineered content should be displayed on the price label or other signage that goes with that food product. For products sold online, this disclosure should be available with other product information before a consumer must make the purchase.

19. How should AMS define small food manufacturers? (Sec. 293(b)(2)(F))

AMS should not unreasonably exempt any manufacturers from the GE labeling requirements. Congress intended to only exempt "cottage foods" and very small companies from the disclosure requirement. The FDA defines "very small business" as businesses averaging less than $1 million in sales and it provides special considerations and exemptions for small businesses in regulations for nutrition labeling, which it defines as averaging less than $500,000 in gross annual sales.

26. What types of records should AMS require to be maintained to establish compliance with the regulations? (Sec. 293(g)(2))

AMS should examine the recordkeeping requirements established by the Vermont labeling law, as many food manufacturers had already started to comply with that law before it was preempted by Congress.

29. How should AMS make public the summary of any examination, audit, or similar activity? (Sec. 293(g)(3)(C))

AMS should publish the full results of any examination or audit on its website.

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

AMS should require imports into the United States to comply with the same disclosure standards as domestically produced products. This is also further reason to use definitions that are already in place internationally through the Codex Commission and the threshold standard being used by trading partners like the EU.

Thank you for your consideration of these comments.

Sincerely,

Wenonah Hauter
Executive Director