



August 25, 2017

Mr. Bruce Summers
Acting Administrator
Agricultural Marketing Service
United States Department of Agriculture
1400 Independence Avenue, SW
Room 3069 South Building
Washington, DC 20250

Re: Stakeholder Input on Questions Regarding the Establishment of a National Bioengineered Food Disclosure Standard.

Dear Acting Administrator Summers:

The National Corn Growers Association (NCGA) appreciates the opportunity to provide input on the Agricultural Marketing Service's (AMS) questions regarding implementation of the National Bioengineered Food Disclosure Standard Law ("the act" or "the law"). Founded in 1957, NCGA represents approximately 42,000 dues-paying corn growers and the interests of more than 300,000 farmers who contribute through corn checkoff programs in their states. NCGA and its 49 affiliated state associations and checkoff organizations work together to help protect and advance corn growers' interests. NCGA recognizes the safety and value agricultural biotechnology has brought to growers and consumers while increasing sustainability of corn production. We also recognize that consumers desire transparency in their food purchasing decisions and we aim to fairly meet that demand through the National Bioengineered Food Disclosure Standard.

NCGA's concerns have been that any mandated disclosure represent biotechnology fairly and accurately while not imposing undue regulatory burdens or create market discrimination when there are no material differences between conventional foods and foods derived from biotechnology. We worked with the Coalition for Safe and Affordable Food (CFSAF) and Congress in the drafting of the National Bioengineered Food Disclosure Standard Law and strongly support the law as enacted, because it strikes the correct balance between achieving transparency, accuracy, and fairness without disparaging biotechnology.

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NCGA supports the Coalition for Safe and Affordable Food’s submission and wishes to be on record independently with our positions on questions 1, 4, 8 and 12, which you’ll find in this document. Key tenets of these positions that NCGA urges AMS to adopt in its rulemaking include:

- Defining bioengineering with respect to a food as one that “contains genetic material” and directs the Secretary to “determine the amounts of a bioengineered substance that may be present in a food” for the food to be considered a “bioengineered food.”
- Consistent with the plain language of the law, we urge AMS to, as Congress intended, determine that refined foods that can substantiate the absence of genetic material in the food below the established threshold, are not subject to the disclosure standard.¹ This does not preclude, as the legislative history discusses, the voluntary disclosure of information beyond that required by regulation.
- We urge AMS to establish a five percent threshold for triggering the Disclosure Standard. A 5 percent threshold is supportive of bioengineering, has the least impact on the domestic and international value chain, is the most compatible with our North American trading partners, Mexico and Canada, and, importantly is consistent with the National Organic Standard which allows organic product to retain the organic label with up to five percent non-organic content.
- Where manufacturers opt to use text to disclose that a food is bioengineered, we urge AMS to limit the statement to “Contains bioengineered ingredients” or “May contain bioengineered ingredients” if, and only if, the food meets the law’s section 291 definition of a bioengineered food – one that contains genetic material above the threshold established by the Secretary.

We appreciate the opportunity to respond to the questions AMS is contemplating and are ready and available to provide further feedback or clarify any outstanding issues.

Thank you,



Wesley Spurlock, President
National Corn Growers Association

¹ Report of the Committee on Agriculture, Nutrition, and Forestry on S. 2609, December 9, 2016 at 3, (hereinafter “Legislative History”) (“Congress intends the Secretary to provide exemptions and other determinations under which a food is not considered bioengineered.”).

**Question 1. What terms should AMS consider interchangeable with ‘bioengineering’?
(Sec. 291(1))**

Context: The disclosure standard would be a mechanism to inform consumers about their food. AMS is considering the advantages and disadvantages of allowing the use of other terms to provide for disclosure.

No terms other than “bioengineering” should be considered interchangeable with “bioengineering” for the purposes of section 291(1) of the National Bioengineered Food Disclosure Law (the “Law”). Use of a single term for purposes of the mandatory disclosure standard would be simplest for consumers.

Additional information: The bipartisan Senate Report² on the Law makes clear that the purpose of the legislation is to “establish a mandatory uniform national disclosure standard for human food that is or may be bioengineered.” We therefore discourage use of any other words or terms within the context of this USDA-AMS mandatory marketing program.

Use of a single term for purposes of mandatory disclosure does not preclude the use of a different term in additional voluntary statements about foods. Additional descriptive terms used in voluntary statements, therefore, should not be considered interchangeable with the term “bioengineering” under section 291. For example, to the extent that USDA-AMS permits the term “genetically engineered” or “genetic engineering” to be used in additional voluntary statements that are truthful and not misleading, the agency should clarify that these terms are not considered interchangeable with “bioengineering” under section 291 and that the ability to use this term in the voluntary disclosure text has no impact on the meaning of “genetic engineering” as that term is used in section 295 of the Law.

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))

Context: Many processed foods may contain ingredients derived from bioengineered crops, such as highly refined oils or sugars that contain undetectable levels of bioengineered genetic material such that they are indistinguishable from their non-engineered counterparts. AMS is considering whether to require disclosure for foods containing those derived ingredients that may be undetectable as bioengineered.

Rather than using the term “highly refined ingredients”, NCGA encourages AMS to use the more accurate term “refined ingredients” when referring to such products as corn syrup and oils.

² S. Rep. No. 114-403 (2016).

We would like to also reiterate that AMS acknowledged that “[m]any processed foods may contain ingredients derived from bioengineered crops, such as highly refined oils or sugars that contain undetectable levels of bioengineered genetic material such that they are indistinguishable from their non-engineered counterparts.”³ AMS further indicated that it is “considering whether to require disclosure for foods containing those derived ingredients that may be undetectable as bioengineered.”⁴

As discussed above, the Act includes a definition of “bioengineering” that, with respect to a food, applies only to foods that contain bioengineered genetic material. AMS should establish a disclosure standard that is consistent with the definition of “bioengineering” contained in the Act.

NCGA believes that refined products that do not contain bioengineered genetic material at measurable levels should not be subject to the mandatory Disclosure Standard. However, this does not preclude AMS from recognizing that there is interest in voluntary labeling statements to identify foods that do not contain bioengineered genetic material but are derived from a crop that was produced with biotechnology.

Because enhanced transparency is critical to building consumer trust and avoiding potential consumer misunderstanding, NCGA strongly encourages AMS to establish a program that allows for truthful, non-misleading disclosure of food products produced with biotechnology but that do not contain bioengineered genetic material. This would create a “safe harbor” and encourage the voluntary disclosure of such information, while reducing the risk of state-level consumer deception litigation. We believe that, absent such a standard, it could be misleading to label, voluntarily or by mandate, a food that does not contain bioengineered genetic material above threshold levels as a “bioengineered food,” based on the definitions in the Act.

QUESTION 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)).

Context: The Law authorizes the Secretary to determine the amount of a bioengineered substance present in food for the food to be disclosed as a bioengineered food. The amounts of a bioengineered substance that may be present in food for the food to be a bioengineered food might be determined in a variety of ways: if a bioengineered substance is near the top of the list of ingredients, by determining the percentage of bioengineered ingredients in a food product, or by listing any ingredient that was produced through bioengineering, among others. AMS is considering how to determine the amount of bioengineered food or ingredient needed for a product to require a bioengineered disclosure, as well as the advantages and disadvantages of various methods.

³ See USDA, “Proposed Rule Questions Under Consideration,” available at: <https://www.ams.usda.gov/rules-regulations/gmo-questions> (last visited Aug. 22, 2017).

⁴ *Id.*

NCGA agrees with others in the coalition that a threshold of five percent is the most appropriate threshold, as it is consistent with other global regulatory standards and with thresholds in USDA's National Organic Program. While there is no single international standard for bioengineered thresholds, five countries, representing eight percent of the world population, follow this approach: Japan, South Africa, Indonesia, Vietnam, and Thailand.⁵ In addition, Canada has a voluntary five percent disclosure threshold.⁶ Further, the National Organic Program allows the use of an "organic" claim on packaged foods even if such foods contain up to five percent of non-organically produced agricultural ingredients that are not commercially available in organic form.⁷ As USDA explains, "[t]here aren't specific tolerance levels in the USDA organic regulations for GMOs, [and] trace amounts of GMOs don't automatically mean the farm is in violation of the USDA organic regulations."⁸

A five percent threshold would reflect the fact that, as the Senate Report on the Act explained, "there is no difference in safety between a bioengineered food and its non-bioengineered counterpart."⁹ The Disclosure Standard is not intended to ensure the safety of food products, nor is it grounded in any concern about the safety of bioengineered foods. Instead, it is "designed solely to address marketing matters."¹⁰ Congress directed USDA to, "when determining the amounts of a bioengineered substance that may be present in food, or the threshold requirement, minimize the impacts on all aspects of the domestic and international value chain."¹¹ This strongly supports a threshold that would be consistent with other similar global disclosure standards and also that would not require detailed, burdensome, and costly

⁵ See U.S. Library of Congress, Restrictions on Genetically Modified Organisms: Japan (last updated June 9, 2015), https://www.loc.gov/law/help/restrictions-on-gmos/japan.php#_ftn46; U.S. Library of Congress, Restrictions on Genetically Modified Organisms: South Africa (last updated June 9, 2015), <https://www.loc.gov/law/help/restrictions-on-gmos/south-africa.php>; USDA Foreign Agricultural Service, GAIN Report No. 1526, Indonesia Agricultural Biotechnology Annual (July 14, 2015), https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Agricultural%20Biotechnology%20Annual_Jakarta_Indonesia_7-14-2015.pdf; USDA Foreign Agricultural Service, GAIN Report No. VM5088: Vietnam Issues Mandatory GMO Labeling Circular (Dec. 30, 2015), https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Vietnam%20issues%20mandatory%20GMO%20labeling%20Circular_Hanoi_Vietnam_12-30-2015.pdf; USDA Foreign Agricultural Service, GAIN Report No. TH6136: Thailand Agricultural Biotechnology Annual (Nov. 16, 2016), https://gain.fas.usda.gov/Recent%20GAIN%20Publications/Agricultural%20Biotechnology%20Annual_Bangkok_Thailand_11-16-2016.pdf.

⁶ See Canadian General Standards Board, CAN/CGSB-32.315-2004: National Standard of Canada, Voluntary labeling and advertising of foods that are and are not products of genetic engineering, §§ 5.1.2 & 5.1.4 (rev. May 2016), available at <https://www.tpsgc-pwgsc.gc.ca/ongc-cgsb/programme-program/normes-standards/internet/032-0315/documents/commite-committee-eng.pdf>. We note that the majority of countries do not require any disclosure, and treat bioengineered ingredients as no different than other ingredients. There are 116 countries (including neighboring trading partners, Canada and Mexico), representing 59% of the countries in the world and 24% of the world population, following this approach.

⁷ 7 C.F.R. 205.301(b).

⁸ See Miles McEvoy, National Organic Program Deputy Administrator in Conservation, Food and Nutrition, Technology, USDA, "Organic 101: Can GMOs Be Used in Organic Products?" (May 17, 2013), available at: <https://www.usda.gov/media/blog/2013/05/17/organic-101-can-gmos-be-used-organic-products>.

⁹ S. REP. NO. 114-403, at 2 (2016).

¹⁰ *Id.* at 4.

¹¹ *Id.*

analyses of trace levels of bioengineered genetic material in order to comply even though there is no safety concern regarding the presence of such material. We also request that AMS establish a threshold for the adventitious presence of bioengineered genetic material in foods that would otherwise not be “bioengineered foods.” This would provide much needed clarity regarding necessary manufacturing and supply chain controls and would avoid unnecessary costs that could stem from efforts to prevent any adventitious presence of bioengineered genetic material that would likely occur under typical food manufacturing conditions.

QUESTION 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))

Context: Currently, some food manufacturers use language compliant with the Consumer Protection Rule 121 from the State of Vermont to identify their food products as bioengineered (“Produced with Genetic Engineering,” “Partially Produced with Genetic Engineering,” or “May be Produced with Genetic Engineering”). AMS is considering whether to allow manufacturers to continue using these disclosures under the new national bioengineered disclosure standard and if their language is appropriate. Further, AMS is considering what phrases could be used as a text disclosure for bioengineered food that consumers would find informative, truthful, and not misleading. AMS is also considering whether there should be one standard text disclosure language, or whether manufacturers should be allowed flexibility to choose from more than one acceptable phrase and where the bioengineered food disclosure should be placed on food packages.

The terminology that NCGA urges AMS to use is “contains bioengineered ingredients” or “May contain bioengineered ingredients.” These statements are informative, truthful, and not misleading. They also adhere to the Act’s definition of bioengineering and would not require manufacturers to change labels when they change sources between bioengineered and non-bioengineered ingredients. Additionally, we urge AMS to adopt one standard text disclosure language to fulfill the Act’s purpose to establish uniformity in disclosure. There are many terms used to describe whether a food is or is not bioengineered, most of which are not accurate nor well understood by the general public. We believe uniformity is best accomplished and consumer understanding advanced by limiting on package text to “contains bioengineered ingredients” or “may contain bioengineered ingredients.”

AMS should not allow manufacturers to continue using the disclosures established under the Vermont law that contradicts the Disclosure Standard enacted by Congress most importantly because the Vermont law disclosures conflict with the plain language and intent of the Act. The Vermont disclosures have highly restrictive thresholds and include food ingredients that are derived from but do not contain genetic material. While such disclosures may have been consistent with Vermont’s unfounded health, safety, and nutritional concerns, Congress expressly rejected Vermont’s approach and instead defined bioengineering with respect to a food as one that contains genetic material. Thus, adhering to Vermont’s prescribed disclosure language (“Produced with Genetic Engineering,” “Partially Produced with Genetic

Engineering,” or “May be Produced with Genetic Engineering”) cannot be reconciled with the Act. Further, adhering to this language would be misleading because it would imply differences in certain food products when none exist. For the many reasons stated in response to question 4, any language that includes “produced from,” “derived from” or “sourced from” is unacceptable when the ingredient provided to the consumer is no different than an ingredient derived from a conventional or organically grown crop.