GMO LABELING: AN EMERGING FOOD LABELING ISSUE

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I. Introduction 21
II. State Laws 22
III. Federal Law 24
IV. Conclusion 28

I. INTRODUCTION

In July of 2016, the National Bioengineered Food Disclosure Standard was signed into law.[1] This law is significant in that it marks the first national standard for labeling bioengineered foods.[2] Prior to its passage, a few individual states had legislation regulating in this area,[3] but the federal genetically modified organism (GMO) labeling law expressly preempted these state laws.[4] The goal of this Essay is to provide information on the mechanics of the Standard, which is important for food, packaging, and agribusiness clients, as this will directly impact their labeling of such products.

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1. 7 U.S.C. § 1639b (Supp. IV 2017).

2. Chris Prentice, *U.S. GMO Food Labeling Bill Passes Senate*, REUTERS (July 7, 2016, 10:09 PM), https://perma.cc/Y728-NDNL.

3. Those states with bioengineered food laws were Connecticut, Maine, and Vermont. *See* CONN. GEN. STAT. § 21a-92c(a) (2013), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017); 22 ME. REV. STAT. ANN. tit. 22, § 2593 (2014), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017); VT. STAT. ANN. tit. 9, §§ 3041-3048 (2014), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017). Alaska also required labeling of genetically engineered fish, but is not discussed in this Essay. *See* Mattie Quinn, *Federal GMO Labeling Bill Would Trump State Laws*, GOVERNING (Mar. 10, 2016), https://perma.cc/9DK4-SMVX.

4. 7 U.S.C. § 1639b(e) (Supp. IV 2017).

II. STATE LAWS

In order to better understand the significance of the federal GMO labeling law, it is important to understand the legal context under which it came into existence. As of 2016, labeling legislation had been introduced in more than thirty states, but had only been signed into law in three states.[5] Each of these states had varying requirements,[6] which would have likely resulted in a large food company that sold products in more than one of these states being required to comply with more than one standard. This, in large part, is the reason state laws were ultimately preempted.[7]

In 2013, Connecticut became the first state to pass a mandatory labeling law for foods that contained GMOs.[8] Under this law, foods that contained genetically engineered ingredients were required to state they were "produced with genetic engineering" clearly on the label of the product.[9] This included any "food intended for human consumption, and . . . seed or seed stock intended to produce food for human consumption, . . ."[10] Products specifically excluded from this mandatory labeling included alcoholic beverages, food served in restaurants or other prepared food intended for immediate consumption, farm products sold directly to consumers, and food from animals that were not generally engineered, regardless of whether the animal was fed genetically engineered food.[11] Failure to comply would render such food misbranded;[12] the penalty was a fine of up to $1000 per day, per product.[13]

The most unique provisions of Connecticut's GMO labeling law were its enacting conditions. For example, the law could not become effective until four additional states also passed mandatory labeling laws, and at least one of those four

5. Quinn, *supra* note 3.

6. For example, Connecticut required one state bordering it to enact a GMO labeling law before it would go into effect. CONN. GEN. STAT. § 21a-92c(a) (2013), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017); *see also* Quinn, *supra* note 3.

7. Quinn, *supra* note 3.

8. Aarian Marshall, *Connecticut Passes First U.S. GMO Labeling Law*, AGRI-PULSE (June 5, 2013, 3:10 PM), https://perma.cc/N3SR-TRBU; *see* CONN. GEN. STAT. § 21a-92c(a) (2013), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017).

9. CONN. GEN. STAT. § 21a-92c(a) (2013), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017).

10. *Id.*

11. *Id.*

12. 2013 Conn. Acts, 13-183 (Reg. Sess.).

13. CONN. GEN. STAT. § 21a-92c(e) (2013), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017).

states bordered Connecticut.[14] In addition, it was required that the aggregate population of states in the Northeast with such laws had a population of more than twenty million people.[15] Lawmakers in Connecticut understood it was likely that impacted food corporations would challenge the law.[16] The rationale for the so-called "trigger clause" was to ensure Connecticut would not be the only state facing such legal challenges.[17]

The second state to pass a mandatory labeling law for GMOs was Maine.[18] In January of 2014, Maine enacted a law that deemed food made with GMO ingredients to be misbranded if it was not labeled as such.[19] Food served in restaurants was specifically exempted from this requirement, as were animal products that came from animals that had been fed genetically engineered feed.[20]

Maine's law was similar to Connecticut's, in that it did not become effective until five other states had also passed labeling legislation or legislation was passed in states that had a combined population of at least twenty million people.[21]

Of the state laws passed by 2016, Vermont's had the biggest impact. Although Connecticut and Maine had previously passed valid mandatory labeling laws, they both had triggering clauses with conditions that had to be met before they became effective.[22] Vermont's law, on the other hand, had no such triggering clause and was the first state mandatory labeling law in the country to become effective.[23] Passed in May of 2014,[24] the stated purposes of Vermont's GMO labeling law were to allow consumers, among other things, to make informed decisions about the foods they purchased, including those made for religious reasons.[25]

14. *Id*.

15. *Id*. For reference, the state of New York had an estimated population of over 19.75 million as of 2016. Kenneth Lovett, *New York State Population Drops for the First Time in a Decade*, N.Y. DAILY NEWS (Dec. 20, 2016, 5:35 PM), https://perma.cc/CYN9-NANA.

16. *See* Marshall, *supra* note 8.

17. *See* Reid Wilson, *Maine Becomes Second State to Require GMO Labels*, WASH. POST (Jan. 10, 2014), https://perma.cc/W495-6XLU.

18. *Id*.; *see* ME. REV. STAT. ANN. tit. 22, § 2593 (2014), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017).

19. ME. REV. STAT. ANN. tit. 22, § 2593 (2014), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017).

20. *Id*.

21. ME. REV. STAT. ANN. tit. 22, § 2596 (2014).

22. *See* CONN. GEN. STAT. § 21a-92c(a) (2013), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017); ME. STAT. tit. 22, § 2593 (2014), *repealed by* 7 U.S.C. § 1639(b) (Supp. IV 2017).

23. *See* VT. STAT. ANN. tit. 9, §§ 3041-3048 (2014), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017).

24. *Id*.

25. *Id*.

Similar to Connecticut, Vermont's law required all foods sold in retail—entirely or partially produced with genetic engineering—to be labeled.[26] Raw agricultural products were to display the words "produced with genetic engineering," and processed foods were to display a label stating one of the following: (1) "partially produced with genetic engineering"; (2) "may be produced with genetic engineering"; or (3) "produced with genetic engineering."[27] The law also exempted food served in restaurants, prepared food intended for immediate consumption, and food from animals that had not been produced using genetic engineering, whether or not the animal consumed feed made with genetic engineering.[28] The penalty included a fine of up to $1000 per day, per product.[29] Although Vermont's law only applied to products sold within the state's borders, it ended up impacting large national brands, as they prepared to comply with this state law.

> Most major food and beverage companies . . . added language to their labels to meet the new rule, rather than deal with the logistical hassle of having separate labels for different states. Campbell Soup was the first big company to say it would label all of its products, and General Mills, ConAgra, Mars and Kellogg's followed.[30]

As such, Vermont's law had a large impact on food companies and the national conversation about GMO labeling laws.[31] As a result of the prospect of multiple differing state laws, the federal government stepped in to pass a national GMO labeling regulation.[32] In this way, food companies would only need to meet the requirements of a singular national law.

III. FEDERAL LAW

President Obama signed into law a bill amending the Agricultural Marketing Act of 1946, in July of 2016.[33] The amendment added a provision requiring the

26. CONN. GEN. STAT. § 21a-92c(a) (2013), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017); VT. STAT. ANN. tit. 9, § 3043(a) (2014), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017).

27. VT. STAT. ANN. tit. 9, § 3043(b)(1)(3) (2014), *repealed by* 7 U.S.C. § 1639b (Supp. IV 2017).

28. *Id.*

29. *Id.*

30. Stephanie Strom, *G.M.O.s in Food? Vermonters Will Know*, N.Y. TIMES (June 30, 2016), https://perma.cc/3UHG-JWDQ.

31. *See id.*

32. Quinn, *supra* note 3; *see* 7 U.S.C. § 1639b (Supp. IV 2017).

33. *See* 7 U.S.C. § 1639b (Supp. IV 2017). *See generally* GREG JAFFE, CTR. FOR SCI. IN THE PUB. INTEREST, ENGINEERING HONESTY: USDA MOVES TO DISCLOSE "GMOS" (Aug.

disclosure of bioengineered foods and food containing bioengineered ingredients, thus creating the National Bioengineered Food Disclosure Standard.[34] Importantly, the Standard expressly preempts all state and local laws requiring labeling or disclosure of bioengineered foods. As soon as it went into effect, the state laws discussed above were nullified.[35]

The law itself does not detail when disclosure is necessary or precisely how companies may comply.[36] Instead, it gives the United States Department of Agriculture (USDA) Secretary relatively broad guidelines to follow and significant discretion to define the law's key terms and determine when and how disclosure is required.[37] The Standard gave the USDA two years from enactment to establish the nationwide mandatory disclosure standard and the procedures for labeling.[38]

Modes of disclosure that are available to companies include: (1) text; (2) a symbol—to be designed by the USDA; or (3) a scannable electronic or digital link allowing consumers the ability to electronically access a disclosure while shopping.[39] The law gives food manufacturers the ability to choose among these disclosure options once the rules are finalized.[40] While the law could be construed to conclude that the food item or package must bear the disclosure, it is unclear if the USDA will take a broader construction of the statute to also allow disclosure via other media, such as disclosure on a display case or nearby signage. Alternative disclosure options are available for small or very small food packages.[41] Small food manufacturers are given additional time to comply with the regulations and likewise have alternative disclosure options.[42] In addition, very small food manufacturers and "food served in a restaurant or similar retail food establishment" are excluded from compliance with the standard.[43]

Finally, special provisions apply to meat, poultry, and egg products.[44] Significantly, the law does not require disclosure of any food derived from an

2017), https://www.ams.usda.gov/sites/default/files/media/CenterforScienceinthePublicInterestBE.pdf.

34. *See* 7 U.S.C. § 1639b (Supp. IV 2017).

35. 7 U.S.C. § 1639b(e) (Supp. IV 2017).

36. *See* 7 U.S.C. § 1639b (Supp. IV 2017).

37. The Act requires the USDA to establish a disclosure standard, but no method is required. 7 U.S.C. § 1639b(a) (Supp. IV 2017).

38. *Id*.

39. 7 U.S.C. § 1639b(b)(2)(D) (Supp. IV 2017).

40. *Id*.

41. 7 U.S.C. § 1639b(b)(2)(E) (Supp. IV 2017).

42. 7 U.S.C. § 1639b(b)(2)(F) (Supp. IV 2017).

43. 7 U.S.C. § 1639b(b)(2)(G) (Supp. IV 2017).

44. *See, e.g.*, 7 U.S.C. § 1639b(b)(2)(A) (Supp. IV 2017).

animal solely because the animal's feed was produced from or contained a bioengineered substance.[45] Therefore, for example, beef sold in supermarkets originating from cows fed bioengineered corn would not require disclosure under the law. Moreover, not all foods containing bioengineered substances will need to be labeled; the law gives the USDA Secretary authority to determine the amount of a bioengineered substance present in food in order for the food to qualify as bioengineered.[46] This provision will undoubtedly garner significant attention in the rulemaking process, as the level of presence defined by the USDA will have a significant impact on what foods require disclosure.

After the Standard's passage, the USDA's first order of business was to study the technical challenges associated with consumer use of electronic or digital disclosures.[47] Essentially, Congress required the agency to determine whether customers would be able to use electronic devices to scan barcodes or QR codes on labels. The USDA released the results of the study on September 6, 2017.[48]

Some of the study's findings include:[49]

- Most Americans own a smartphone (77%)
- Most Americans live in areas with sufficient broadband access (93.6%) to scan a link, but 20.5 million Americans do not have access to adequate broadband
- 97% of regional chain stores provide Wi-Fi in store; 100% of national chains provide Wi-Fi
- Consumers may recognize digital links, but only 62% believe they would be able to access an electronic or digital food disclosure
- Access to the Internet may pose challenges for consumers in rural areas and consumers using smaller retail outlets
- The USDA is required to use the study results to determine if customers, "while shopping, would not have sufficient access to the bioengineering disclosure through electronic or digital disclosure methods, the Secretary, after consultation with food retailers and manufacturers, shall provide additional and comparable options to

45. *Id*.

46. 7 U.S.C. § 1639b(b)(2)(B) (Supp. IV 2017).

47. *See* 7 U.S.C. § 1639b(c)(1) (Supp. IV 2017).

48. *See generally* DELOITTE TOUCHE TOHMATSU LTD., STUDY OF ELECTRONIC OR DIGITAL LINK DISCLOSURE (July 2017), https://www.ams.usda.gov/sites/default/files/media/USDADeloitteStudyofElectronicorDigitalDisclosure20170801.pdf.

49. *See generally id*.

access the bioengineering disclosure."[50]

- In August 2017, the USDA closed the public comment period for some of the weightier unanswered questions associated with developing the disclosure and labeling standards.[51]

Probably the most significant outstanding questions are the following:

1. How will the USDA define the term "bioengineered," especially in light of new and emerging genetic modification technologies?
2. What amount of bioengineered material present in a food product will be sufficient to trigger the disclosure obligations?
3. What modification should be considered "found in nature" and thus not requiring disclosure?
4. What breeding techniques should be considered conventional and thus excluded from the disclosure requirements?
5. Should the USDA require disclosure for food that contains highly refined products, such as oils or sugars derived from bioengineered crops?
6. How will the USDA define "small food manufacturer," "very small package," and "small package"?
7. How should the USDA define "similar retail food establishments" that are excluded from disclosure requirements?
8. What records must a manufacturer retain to establish compliance?
9. What disclosures will be required for fruit (and other unprocessed and bulk items) that aren't sold in individual packages?
10. What must the manufacturer actually disclose in an electronic or digital link?
11. How will the USDA incorporate the results of the electronic and digital link disclosure survey?
12. How will the disclosure requirement apply to imported products?

The answers to these questions will have wide-ranging and potentially significant impacts on companies in the food, beverage, and agribusiness sectors. Thus, while awaiting the proposed rule, it is important for companies to start an

50. 7 U.S.C. § 1639b(c)(4) (Supp. IV 2017).

51. *See generally* DELOITTE TOUCHE TOHMATSU LTD., *supra* note 48.

internal dialogue about how the law might impact their businesses and whether it may be worthwhile to file a comment.

IV. CONCLUSION

It is obvious from the many states considering legislation that the GMO labeling debate was an important topic to consumers and those involved in the food industry. The National Bioengineered Food Disclosure Standard preempted the state GMO labeling laws in Connecticut, Maine, and Vermont.[52] The law provides general guideposts to the USDA, but leaves the agency with significant authority and discretion to delineate the criteria for determining what foods will ultimately require disclosure and how that disclosure should be made.[53]

The USDA is clearly grappling with some difficult questions relating to implementation, having sought public input on many of the law's core issues.[54] It is unclear how the USDA will address these issues or how the agency will incorporate the results of its study, which show rural and poor communities may not have sufficient access to the Internet and smartphones. The proposed rules—due to be issued in the second half of 2018—will likely answer some of these questions but may also present additional questions for consumers and food companies.

52. 7 U.S.C. § 1639b(e) (Supp. IV 2017).

53. *See generally* 7 U.S.C. § 1639b (Supp. IV 2017).

54. *See* U.S. Dep't of Agric., *Proposed Rules Under Consideration*, RULES & REGS., https://perma.cc/J95P-FVRC (archived Apr. 19, 2018); U.S. Dep't of Agric., *USDA Seeks Input in Developing a Proposed Bioengineered Food Disclosure Rule*, ABOUT AMS (July 20, 2017), https://perma.cc/D5D3-5F94.