National Milk Producers Federation

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July 3, 2018

United States Department of Agriculture
Agricultural Marketing Service
Docket Clerk
1400 Independence Avenue, SW
Room 4543 - South
Washington, DC 20250

Submitted via www.regulations.gov

RE: Proposed Rule – National Bioengineered Food Disclosure Standard – Doc. No. AMS-TM-17-0050 83 Fed. Reg. 19860 (May 4, 2018)

Dear Sir/Madam:

The National Milk Producers Federation (NMPF), based in Arlington, VA, develops and carries out policies that advance the well-being of dairy producers and the cooperatives they own. The members of NMPF's cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of more than 32,000 dairy producers on Capitol Hill and with government agencies. Visit www.nmpf.org for more information.

NMPF submits these comments in response to the Department's request for stakeholder input regarding the promulgation of a rule to implement the National Bioengineered Food Disclosure Standard (NBFDS). We also are members of, and signatories to, the comments filed by the Coalition for Safe, Affordable Food (hereinafter, the Coalition). In addition, NMPF filed comments last summer in response to questions USDA put forth which are attached here for your convenience. NMPF's views on those questions has not changed on any of the issues, though in the interest of cooperation we agree with the positions the Coalition has advocated.

As we stated in our individual comments from last summer, we are dismayed by the number of entities that are constantly conveying messages stating or implying that bioengineering is dangerous, and have vilified its use despite incontrovertible scientific evidence that shows it is safe and there is no material difference between a bioengineered food and its non-bioengineered counterpart. Chief among these anti-science zealots have been individuals and groups sowing fear and obfuscation to manipulate consumers. For example:

Jeffery Smith at the Institute for Responsible Technology[1] has made some very revealing statements which include:

1) "Labeling GMOs was never the end goal for us. It was a tactic. Labels make it easier for shoppers to make healthier non-GMO choices. When enough people avoid GMOs, food companies rush to eliminate them. Labeling can speed up that tipping point—but only if consumers are motivated to use labels to avoid GMOs."

2) "Our ultimate goal, to eliminate GMOs, is happening more and more with each non-GMO announcement."

3) "This major shift in the marketplace has come about due to compelling, behavior-change messaging. And that's IRT's specialty. It involves: Accurately conveying the health dangers of GMOs in compelling ways."

Also, the Non-GMO Project makes its share of provocative statements[2].

1) "One of the elements that sets the Non-GMO Project Standard apart from other non-GMO claims is the requirement to test high-risk ingredients for GMO contamination. An ingredient can be classified as high risk if it is derived from, contains derivatives of, or is produced through a process involving organisms that are known to be genetically modified and commercially produced."

2) "Animal products such as milk, meat, eggs, and honey are considered high-risk inputs due the prevalence of GMOs in animal feed. As such, animal products are evaluated by looking at the feed and testing high-risk inputs in the feed."

There are no health dangers or "high risks" associated with bioengineered foods, and stigmatizing animal products from animals fed bioengineered feed is both absurd and contrary to the language in the statute. These assertions are blatantly false and misleading. Unfortunately, the decade-plus negative characterization of the use of bioengineering has stigmatized products associated with it and consumers are being misled.

[1] http://responsibletechnology.org/even-though-obama-just-signed-the-dark-act/
[2] https://www.nongmoproject.org/gmo-facts/high-risk/

The Food and Drug Administration (FDA) in its 1992 guidance[3] on labeling bioengineered foods states:

> The FD&C Act prohibits the introduction or delivery for introduction into interstate commerce of any food that is misbranded. 21 U.S.C. § 331(a). Under section 403(a)(1) of the FD&C Act, a food is misbranded if its labeling is false or misleading in any particular. 21 U.S.C. § 343(a)(1). Section 201(n) of the FD&C Act (21 U.S.C. 321(n)) provides that labeling is misleading if, among other things, it fails to reveal facts that are material in light of representations made or suggested in the labeling, or material with respect to consequences that may result from the use of the food to which the labeling relates under the conditions of use prescribed in the labeling, or under such conditions of use as are customary or usual. 21 U.S.C. § 321(n). In a 1992 "Statement of Policy: Foods Derived from New Plant Varieties" (1992 Policy) (Ref. 5) FDA explained its interpretation of the FD&C Act with respect to foods derived from new plant varieties, including varieties developed using bioengineering. **In the 1992 Policy, FDA stated that it was not aware of any information showing that bioengineered foods differ from other foods in any meaningful or uniform way, or that, as a class, foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding (Ref. 5) [emphasis added].** Further, FDA concluded that the method of development of a new plant variety (including the use of new techniques such as rDNA technology) is generally not material information within the meaning of section 201(n) of the FD&C Act, and would not usually be required to be disclosed in the labeling for the food. This determination was reviewed and upheld by the court in Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 178–79 (D.D.C. 2000) (finding that FDA's determination that genetic engineering, alone, is not a material fact that warrants food labeling was entitled to deference) (Ref. 10). Labeling provided by manufacturers on a wholly voluntary basis regarding whether a food was or was not bioengineered as described in this guidance is acceptable to FDA, provided that such labeling is truthful and not misleading. Some consumers are interested in the information provided in such labeling.

[3] Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Derived from Genetically Engineered Plants

In that same guidance, FDA cautions the reader against making false and misleading statements with respect to bioengineering.

> Further, **a statement may be false or misleading if, when considered in the context of the entire label or labeling it suggests or implies that a food product or ingredient is safer, more nutritious, or otherwise has different attributes than other comparable foods because the food was not genetically engineered [emphasis added].** For example, the labeling of a bag of specific type of frozen vegetables that states that they were "not produced through modern biotechnology" could be misleading if, in addition to this statement, the labeling contains statements or vignettes that suggest or imply that, as a result of not being produced through modern biotechnology, such vegetables are safer, more nutritious, or have different attributes than other foods solely because the food was not produced using modern biotechnology.

NMPF believes that the pervasive anti-bioengineered rhetoric not only implies that bioengineered foods are not safe, it screams it. And, due to the constant rhetoric, any disclosure that a product is "not bioengineered" is a suggestion that that product is safer. NMPF asks how can we overcome the fearmongering and educate consumers about the safety of bioengineered products and the benefits that they convey? Should we require a qualifying statement, like the one below, to be used whenever a disclosure is made regarding the presence or absence of a bioengineered ingredient? We believe so.

> "No material difference has been shown between ingredients created using bioengineering and ingredients created without bioengineering."

We have a serious problem on our hands: consumers are constantly being misled and sound public policy requires that we stand up for science, either with a qualifying statement, or by some other means. The worst outcome is to stand by and do nothing. Further, we believe that such a statement as above will go a long way in educating consumers and is consistent with the statute which requires that food disclosures shall not assert or imply that a bioengineered food is safer than, or not as safe as a non-bioengineered counterpart.

As indicated above, NMPF supports the comments filed by the Coalition. While we agree with what the Coalition proposes, we do wish to make several points.

First, we urge USDA to emphasize the statutory and factual point that milk and meat from animals consuming bioengineered feed are not bioengineered foods. Some food companies are in fact implying that their products derived from animals that have not been fed bioengineered grain are better or safer. That is untruthful, that is false, that is misleading. USDA should express its disdain for such contemptuous and wrongful marketing practices in the strongest way possible.

Second, it is not clear why, but for some reason USDA's proposed regulation failed to exempt bioengineered enzymes from triggering mandatory disclosure. There are approximately 65 countries that have some variation of a bioengineered food disclosure standard and every single one does not require disclosure due to the presence of a bioengineered enzyme which is used in such a small quantity to achieve its effect. We urge USDA to correct this oversight and place the U.S. rule in a position consistent with all other international rules on this subject. This is very important to the U.S. cheese industry, in particular, because approximately 75% to 80% of cheese production here is done with bioengineered enzymes -- which for the record do not contain any bioengineered substance due to the refining process.

Third, NMPF believes that the Act is clear as to what is and is not a bioengineered food and we believe we should limit mandatory bioengineered food disclosure to the foods and food ingredients that actually meet the definition in the statute. In that sense, we do not believe most previously identified "highly refined" ingredients meet that statutory definition. That said, NMPF defers to the Coalition's concept of having a single list of bioengineered foods and ingredients and we support the process by which an entity can provide USDA evidence to establish that a food or food ingredient that is presumed to meet the definition of being bioengineered overcomes that presumption and is placed on a list on non-bioengineered foods that do not require disclosure.

Fourth, NMPF has concerns about voluntary disclosures and their potential to be false and misleading. If they were to use the previously identified qualifying statement in conjunction with a voluntary disclosure that would alleviate much of our concern. That said, while NMPF supports the First Amendment free speech rights of commercial enterprises, we recognize that commercial free speech does not enjoy the freedoms and lesser scrutiny that non-commercial speech enjoys. It is imperative that companies not create false and misleading disclosures, and we suspect the plaintiff's bar stands ready to hold those that do accountable. One area that we find particularly troubling is the disclosure that a food or food ingredient "was produced with bioengineering". As discussed during the legislative enactment of the Act, that statement is so ambiguous and meaningless it is mind numbing. We would encourage USDA to steer clear of any endorsement of such a disclosure.

Fifth and finally, this rule is a marketing standard not a food safety standard, and USDA should keep that in mind while promulgating the final rule. Along those lines NMPF would have preferred a 5% across the board de minimis threshold, below which

a food comprised of ingredients which represent less that 5% of the overall product if bioengineered, would not trigger a mandatory bioengineered food disclosure. That would be consistent with the organic program which allows up to 5% non-organic food in a food labeled as organic. The organic program, like the bioengineered food standard is a marketing standard, not a food safety standard. In the spirit of collaboration however, NMPF supports the Coalition's dual approach, 5% for inadvertent and 0.9% for intentional bioengineered ingredients.

NMPF greatly appreciates the opportunity that USDA has provided to share our views on this important issue and we stand willing to share additional insight as needed.

Sincerely

Clay Detlefsen
Senior Vice President & Counsel

ATTACHMENT