NOFA-NY
NORTHEAST ORGANIC FARMING ASSOCIATION OF NEW YORK

June 29, 2018

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

Docket No.: AMS-TM-17-0050

Re: Comments on proposed regulations to implement the National Bioengineered Food Disclosure Standard

Dear Secretary Perdue,

Founded in 1983, the Northeast Organic Farming Association – New York (NOFA-NY) is the premier statewide organization growing a strong organic and sustainable agriculture movement in New York State. NOFA-NY provides education and assistance to local organic and sustainable farmers; connects consumers with organic and sustainable farmers; advocates policies that support a sustainable food and farm system at both the state and federal levels; and, we are the largest USDA-accredited organic certifier in New York, certifying over 1,000 organic operations in the state.

NOFA-NY submits the following comments on the USDA's proposed regulations to implement the National Bioengineered Food Disclosure Standard.

Throughout its 35-year history, NOFA-NY has always believed in transparency and disclosure in the food supply. NOFA-NY's membership has passed a number of policy resolutions clarifying our position on GMOs. In 1999, our members passed a Comprehensive Food Labeling resolution that stated that all foods sold in the United States should label any ingredients derived from genetically-engineered organisms.

In January 2015, NOFA-NY passed the following resolution to support GE labeling, and food disclosure regarding GMOs in food:

> Whereas, bona fide GMO labeling is not currently the law of the land, and Whereas, we support and encourage local, state and national food campaigns to promote GMO awareness, therefore:

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RESOLUTION: The members of NOFA-NY resolve that we support and encourage local, state and national food campaigns to promote GMO awareness by communicating to the public that over 75% of processed foods already contain a GMO.

NOFA-NY members—farmers and consumers—feel strongly that genetically engineered crops:

- create environmental risks, perhaps irreversible,
- present consumer health concerns that have not fully been researched, and
- put the integrity of the organic and non-GMO markets at risk—jeopardizing the organic farmers' right to farm and consumers' right to know.

In 2016, NOFA-NY joined thousands of New Yorkers to support a New York State bill to require the labeling of Genetically Engineered foods in the state.

Therefore, it is with concern that we have read the proposed rule to implement the "National Bioengineered Food Disclosure Standard (NBFDS) for disclosing any BE food and any food that may be bioengineered." [FR Vol. 83, No. 87; 19860]. Our concerns are outlined below:

1) Use well-established terms, "Genetic Engineering" or "GMO", rather than a seldom-used term, "Bioengineered," which is normally associated with the medical field.

For over thirty years, the terms "genetic engineering", "GE", or "GMO" have been used to describe *food*: "(A) that contains genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques; and (B) for which the modification could not otherwise be obtained through conventional breeding or found in nature" 7U.S.C. 1639(1). Consumers, companies, and regulators have used these terms no matter what side of the issue they are, and there are already companies using the GMO or Genetically Engineered label.

The newly-minted term, "Bioengineered" or its unknown abbreviation, BE, will only mislead and confuse consumers, as well as cause disruption of existing labeling in the marketplace. In a label that is supposed to provide disclosure and transparency, using this term only provides obfuscation of a term, Genetic Engineering, which consumers have, through poll after poll in the past decade or more, clearly said they want labeled.[1]

In addition, allowing familiar terms would also provide consistency with current federal policy and terminology. For example, the USDA's Food Safety and Inspection Service uses the terms "Genetically Engineered" and "GMO" in addition to "bioengineered" in its recent guidance for companies that make labeling claims concerning the fact that GMO ingredients are not used in a meat, poultry, or egg product.[2] The USDA uses the terms "genetic modification" and "genetic

[1] Consumers Want Mandatory Labeling of GMO Foods (2015). *Consumer Reports*. Retrieved from https://www.consumerreports.org/food-safety/consumers-want-mandatory-labeling-for-gmo-foods/

[2] Statements That Bioengineered or Genetically Modified (GM) Ingredients or Animal Feed Were Not Used in Meat, Poultry, or Egg Products (2016). *U.S. Department of Agriculture*. Retrieved from https://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/labeling/claims-guidance/procedures-nongenetically-engineered-statement

engineering" in its regulations of plants produced using biotechnology.[3] FDA has stated that it considers "genetic engineering" to be the more precise term, but acknowledges that some use and recognize the terms "genetic modification" and "genetically modified organisms or GMOs".[4]

2) Use clear, on-package labels

NOFA-NY opposes the use of "QR codes" or "Smart UPC codes", websites or text messaging as a substitute for clear on-package labeling. Encoded images that must be scanned by a smart phone or taken to an in-store kiosk to reveal information about whether a product was produced with genetic engineering are inherently discriminatory: both rural and urban poor, as well as minority and elderly populations are disproportionately under-served by a reliable broadband connection, including many communities in New York which do not have access to broadband at all.

5.4 million New Yorkers, or 27.7 percent of the population, lacked access to broadband as of 2015, including 9% in New York City.[5] While the state is in the middle of a Broadband initiative, progress has been slower than expected[6]; this lack of access would clearly affect those populations' ability – both rural and urban -- to get information about the content of their food.

Even when Broadband is available, these methods are time-consuming and act as a disincentive for true transparency. This indirect form of food labeling would be unprecedented. NOFA-NY urges clear, on-package labels to maximize the benefits of required disclosures to all consumers.

3) Use neutral symbols

The disclosure law permits the use of symbols instead of text. However two of the three symbols proposed by USDA are cartoonishly pro-biotech, with inappropriate "smiley faces"—suggesting relative safety over non-GMO products, which is expressly prohibited in the statute. None of the three symbols are easily recognizable or understandable as having anything to do with Genetic Engineering, GE or GMOs.

Symbols should be content neutral and easy for consumers to understand, such as a circle with "GE" or "GMO" inside it. Please eliminate biased symbol options, and use the abbreviations "GE" or "GMO", not "BE."

[3] 7 CFR § 340.1

[4] Consumer Info About Food from Genetically Engineered Plants (2018). *U.S. Food and Drug Administration.* Retrieved from https://www.fda.gov/Food/IngredientsPackagingLabeling/GEPlants/ucm461805.htm

[5] https://www.politico.com/states/new-york/albany/story/2015/03/more-than-25-percent-in-ny-lack-minimal-broadband-access-067223

[6] https://www.news10.com/news/broadband-upgrades-across-ny-slow-to-roll-out_2018031310220478/1037495102; http://www.govtech.com/network/Broadband-Delays-Prompt-Frustration-in-Rural-New-York.html

In addition, other abbreviations of the term Bioengineering, are also very close to the term "BIO" which is widely used in the EU to mean "Organic". Use the commonly-accepted term for genetic engineering: GE, GMO, or Genetic Engineering.

4) Label all processed foods and highly refined products that contain ingredients produced with genetic engineering or derived from genetically engineered crops.

Consumers expect all foods produced with genetic engineering to be labeled. The vast majority of genetically engineered foods are not whole foods, but processed foods, made with genetically engineered crops such as corn, soy, canola, and sugar beets. Many of these products, such as sugar from genetically engineered beets, are so highly refined that current DNA tests may or may not "show" the genetically engineered content in the final product, despite the source of the ingredient(s) indisputably being genetically engineered.

USDA should require disclosure and labeling of all foods that are derived from genetically engineered ingredients, even if they are so highly processed that the genetically engineered material is undetectable in current testing methods. This includes cooking oils, sodas, and candies. If these ingredients are left out, it is possible that thousands of genetically engineered foods will remain unlabeled. This would be grossly misleading, confusing, and fails to inform consumers. A meaningful standard should not be based on the current status of DNA testing technology. Any meaningful standard must include these genetically engineered products, regardless of how highly refined they are.

5) Ensure future food products made with newer forms of genetic engineering are covered.

Companies are currently experimenting with newer forms of genetic engineering, such as gene-editing. Foods such as oranges, cacao, potatoes, soy, and canola "bioengineered" with CRISPR are in development. USDA must ensure that any foods made with these newer forms of genetic engineering are required to be labeled.

Furthermore, the definition of "bioengineering" and disclosure of genetically engineered foods must be consistent with international standards. We urge AMS to follow FDA's lead and consider that the term "bioengineering" is a synonym for "modern biotechnology." The term "modern biotechnology" is accepted by FDA and has a common, globally accepted standard definition, as noted both by the Codex Alimentarius Commission and the Convention on Biological Diversity.

The standards and guidelines[7] adopted by Codex Alimentarius are recognized by the World Trade Organization as the authoritative standard for purposes of settling international trade disputes, and therefore should be a guidepost for USDA. The following definition comes from the Principles for Risk Analysis of Foods Derived from Modern Biotechnology adopted by the Codex Alimentarius Commission in 2003.[8]

[7] See Food and Agriculture Organization of the United Nations, Codex Alimentarius, http://www.fao.org/fao-who-codexalimentarius/about-codex/en/

[8] Food and Agriculture Organization of the United Nations, Codex Alimentarius Commission. 2003. Principles for

i. ***Modern biotechnology:***
(i) in vitro nucleic acid techniques, including recombinant DNA and direct injection of nucleic acid into cells or organelles, or
(ii) fusion of cells beyond the taxonomic family, that overcomes natural, physiological reproductive or recombination barriers, and that are not techniques used in traditional breeding and selection.

This definition is inclusive of new gene editing techniques, including techniques, such as CRISPR and RNA interference (RNAi).

Failure to require disclosure of food produced with modern forms of biotechnology would create conflict with other federal definitions. The definition of "biotechnology product" put forward in a 2015 memorandum issued by the White House from the Executive Office of the President includes all of the newer technologies used in biotechnology, such as gene editing or gene silencing:

> *For the purpose of this memo, "biotechnology products" refers to products developed through genetic engineering or the targeted or in vitro manipulation of genetic information of organisms, including plants, animals, and microbes. It also covers some of the products produced by such plants, animals, and microbes or their derived products as determined by existing statutes and regulations.*[9]

Failure to require disclosure of food produced with modern forms of biotechnology would also create trade conflicts with other countries. Most of the countries that require the disclosure of GMO foods require that modern forms of biotechnology (including gene silencing or deletion via RNAi and CRISPR) be disclosed.[10] A disclosure label so far out of conformity with international labels could thwart international trade.

6) Harmonize with the European Union standard.

USDA proposes two options for genetically engineered content arising from inadvertent contamination at some point in the supply chain. USDA should use the 0.9% threshold because it is high enough to cover contamination; has long been established in the European Union and

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the Risk Analysis of Foods Derived from Modern Biotechnology (CAC/GL 44-2003). Available online at: www.fao.org/input/download/standards/10007/CXG_044e.pdf

[9] Memorandum for Heads of Food and Drug Administration, Environmental Protection Agency, and Department of Agriculture Regarding Modernizing the Regulatory System for Biotechnology Products, Executive Office of the President, July 2, 2015 (July 2015 EOP Memorandum) Referenced online at https://www.epa.gov/sites/production/files/2016-12/documents/modernizing_the_reg_system_for_biotech_products_memo_final.pdf.

[10] To assess the labeling policies of various countries, NOC referenced a review conducted by the Environmental Working Group. The following relevant sources we included in the review: materials prepared by the Center for Food Safety (http://www.centerforfoodsafety.org/ge-map/), relevant international governmental reports and regulations, and reports from USDA's Global Agriculture Information Network, where applicable.

therefore would facilitate trade with EU countries; and it aligns with existing standards of many U.S. food companies. A third option – to permit even intentional use of a GMO ingredient up to 5% of the entire food item's weight – would exempt the great majority of genetically engineered foods from mandatory labeling and is vigorously opposed by NOFA-NY.

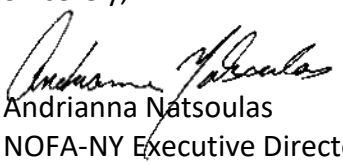
7) Disclosure now; not postponed until 2022.

The labeling law requires regulations be finalized by July 29, 2018. However this Rule would allow companies to postpone GMO labeling until as late as 2022 and instead permit them to use up labels without GMO content information. This is an entirely unreasonable delay. Many companies are already labeling, and this delay would cause confusion in the marketplace. Companies change their labels very fast all the time for a variety of marketing reasons, so this would not be a hardship of any kind. All companies must be required to use GMO content labels by January 1, 2020.

NOFA-NY supports the detailed comments submitted by the National Organic Coalition, Center for Food Safety, and Consumer Reports.

Thank you for your attention to these comments.

Sincerely,



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