



Submitted electronically

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Secretary of Agriculture Sonny Perdue
U.S. Department of Agriculture
1400 Independence Avenue S.W.
Washington, DC 20250

Re: Comments of the Institute for Agriculture and Trade Policy on Proposed Rule “National Bioengineered Food Disclosure Standard,” Agricultural Marketing Service, USDA, Docket Number AMS-Tm-17-0050, Federal Register Vol. 83 No. 87 at 19860

The Institute for Agriculture and Trade Policy (IATP) appreciates this opportunity to submit comments on the proposed rule, “National Bioengineered Food Disclosure Standard.”¹ For more than 30 years, IATP has provided technical expertise and research in support of sustainable and economically viable family and small-scale farms, rural communities and healthy food, including work on food labeling and biotechnology, both in the United States and internationally. Regarding modern biotechnology, IATP’s most recent comment to USDA, in April 2016, concerned its proposed “Environmental Impact Statement: Introduction of the Products of Biotechnology.”²

If properly designed and implemented, food labeling is a key, evidence-based strategy that communicates necessary information to consumers, including about organic ingredients, nutritional content and country of origin, as well as characteristics such as whether a food or ingredient is genetically engineered. In enacting legislation in 2016 requiring a National Bioengineered Food Disclosure Standard (adding Subtitles E and F to the Agricultural Marketing Act of 1946),³ Congress was responding to strong consumer interest to require labeling of genetically modified food. Surveys conducted over several years by different organizations have shown broad and consistent support for mandatory labeling, with about 90 percent of the polled U.S. population in support.⁴

¹ U.S. Department of Agriculture, Agricultural Marketing Service, National Bioengineered Food Disclosure Standard, 7 CFR Part 66, 83 FR 19860 et seq.

² <https://www.iatp.org/sites/default/files/APHIS%20biotech%20comment.pdf>

³ Public Law 114-216, amending the Agricultural Marketing Act of 1946, 7 U.S.C 1621 et seq. Subtitles E and F are codified at 7 U.S.C. 1639 et seq.

⁴ See, Annenberg Public Policy Center (2016), <https://www.annenbergpublicpolicycenter.org/americans-support-gmo-food-labels-but-dont-know-much-about-safety-of-genetically-modified-foods/>; Consumers Union (2014), <https://consumersunion.org/news/new-consumer-reports-poll-shows-consumer-demand->

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This consumer interest spurred multiple state governments across the country to enact legislation to address a significant void in national policy.⁵ With the enactment of the National Bioengineered Food Disclosure Standard legislation, state-level mandatory standards that major food companies were already complying with were preemptively wiped out.⁶

This is important context as we review and comment on the USDA's proposed disclosure rule, which if adopted as proposed will decrease the availability and accuracy of information provided to consumers. Not only would the rule as proposed create a misleading, ineffective and ultimately unworkable federal standard, but it would cause confusion with respect to voluntary GMO-free labeling certification already in widespread use. Fundamentally, the rule taken in its entirety appears designed to obfuscate, rather than disclose, information. Further, our review finds that it fails on several counts to meet critical requirements of the law it is intended to implement:

- (1) USDA has proposed definitions of "bioengineered" that narrowly define the scope of coverage to exclude from the rule's requirements the vast majority of food products containing genetically engineered ingredients;
- (2) The rule proposes using unfamiliar and confusing nomenclature that is inconsistent with longstanding voluntary certification labels, consumer expectations and international norms, and fails to comply with the law's mandate that the disclosure standard be neutral with respect to whether a bioengineered food is safer than or less safe than its non-bioengineered counterpart;
- (3) The proposal fails to provide real-time information that can be accessed by shoppers to compare products on the shelves while they are shopping, and allows manufacturers to use disclosure methods that discriminate against rural communities and low income, minority, and older consumers;
- (4) The proposed rule ignores evidence in the USDA's own report, which was mandated by Congress, identifying numerous technological challenges to accessing information through digital means, and fails to adequately address these deficiencies including the requirement that digital link disclosure not include advertising;

[for-strong-federal-standards-for-genetically-engineered-food/](#); New York Times (2013), https://www.nytimes.com/2013/07/28/science/strong-support-for-labeling-modified-foods.html?_r=0.

⁵ Morgan Simpson and Doug Farquhar, National Conference of State Legislatures Blog, "Regulating GMO Labelling at State and Federal Levels," June 30, 2016, <http://www.ncsl.org/blog/2016/06/30/regulating-gmo-labelling-at-state-and-federal-levels.aspx> (accessed June 11, 2018)

⁶ Stephanie Strom, "Campbell Labels Will Disclose G.M.O. Ingredients," The New York Times, January 7, 2016, <https://www.nytimes.com/2016/01/08/business/campbell-labels-will-disclose-gmo-ingredients.html>

- (5) The proposal inadequately assesses the costs and benefits of the proposed rule by shifting the cost of achieving real-time disclosure onto retail facilities and consumers, while failing to enumerate and evaluate those costs;
- (6) Significant provisions of the proposed rule are inconsistent with international norms and trade agreements, contrary to the intent of Congress; and
- (7) The proposed rule unreasonably delays implementation and compliance requirements.

IATP calls on USDA to make significant changes before issuing the final rule. We discuss our concerns, and suggested changes, below.

A. PROPOSED DEFINITIONS AND EXCLUSIONS WOULD CREATE LOOPHOLES THAT UNREASONABLY LIMIT MANDATORY DISCLOSURE, WHILE UNDERMINING EXISTING VOLUNTARY “NON-GMO” CERTIFICATION PROGRAMS AND CAUSING CONSUMER CONFUSION

Definition of “bioengineered” should include processed foods. USDA seeks comment as to whether it should define “bioengineered” in such a way as to exclude most genetically engineered foods from the disclosure requirements. (Note that throughout these comments, IATP uses the terms “genetically engineered,” “GE” and “GMO” interchangeably with “bioengineered,” since the latter term is not in wide public usage.) IATP strongly opposes “Position 1,” USDA’s proposal to exempt processed foods made with ingredients from GE commodity crops such as corn, soy, canola and sugar beets. USDA asks whether “refined products” made from “BE crops, such as sucrose; dextrose; corn-starch; high-fructose corn syrup; and corn, canola, and soybean oils” should be considered bioengineered.⁷ To ask the question is to answer it; this narrow definition would swallow the rule, since the vast majority of GE foods are not whole foods but processed foods containing the listed ingredients. Not to label these foods with the disclosure is contrary to the intent of the law and utterly inconsistent with consumer expectations and international norms.

Definition of “bioengineered” should be applied to newer genetic modification techniques. Newer techniques such as gene editing should be included within the scope of the rule’s disclosure requirements. The rule’s definition of “bioengineered” food as 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

⁷ 87 FR 19863-64

in nature” does not clearly include GE 2.0 technologies, such as gene-editing, synthetic biology and RNAi. The definition of “bio-engineered” should be consistent with the Codex Alimentarius Commission definition of “modern biotechnology,” which clearly subsumes the new techniques, such as TALENS and CRISPR- CAS9.⁸ As a result, the Disclosure Standard must apply to foods derived from these new genetic engineering techniques.

Exemptions should be limited. The rule should exempt from disclosure only truly “de minimis” unintentional and unavoidable GMO contamination. Currently, for a product to receive the Non-GMO Project verification, a consignment of the product cannot contain more than 0.9% of GMO by weight.⁹ USDA offers this option as “Alternative 1-B” for Section 66.5(c), and correctly notes that the option is consistent with the thresholds established by some U.S. trading partners.¹⁰ Because it is also consistent with current U.S. norms for voluntary “Non-GMO” labeling, this approach is the least confusing and most appropriate option. USDA requests comment on alternative proposals that would allow significantly more genetically engineered content without requiring disclosure. IATP strongly opposes these alternative options. Alternative 1-A would allow 5 percent of any ingredient by weight to be genetically engineered, without requiring disclosure, if its presence is “inadvertent or technically unavoidable.” Alternative 1-C is even worse; it would allow manufacturers to hide GE content from consumers if those ingredients together constituted no more than 5 percent by weight—even if the GE ingredients were not unintentional contaminants but intentionally used in the product.

Up to 86 percent of food manufacturers shouldn’t be excluded from full disclosure under the so-called “small manufacturer” exception. In Subtitle E, Congress provided that “small manufacturers” would be granted an additional year to comply with the disclosure requirements, and could comply by means of a phone number or Internet URL. The rule proposes to define “small manufacturers” as any food manufacturer with annual receipts between \$2.5 million and \$10 million. According to data in the explanatory material supporting the proposed rule, this exception would allow 86 percent of food manufacturers and nearly 64 percent of dietary supplement manufacturers to use ineffective methods of disclosure. As we discuss in more detail below, the report USDA commissioned from Deloitte Consulting LLP, “Study of Electronic or Digital Link Disclosure, A Third-Party Evaluation of Challenges Impacting Access to Bioengineered Food Disclosure” (hereinafter “Deloitte”), found that neither

⁸ Food and Agriculture Organization of the United Nations, Codex Alimentarius, “Principles for the risk analysis of foods derived from modern biotechnology”, available at: www.fao.org/input/download/standards/10007/CXG_044e.pdf, accessed June 23, 2018

⁹ Non-GMO Project Standard, Version 14.2 (September 22, 2017), <https://www.nongmoproject.org/wp-content/uploads/2017/09/Non-GMO-Project-Standard-Version-14.2.pdf>, accessed June 28, 2018

¹⁰ 83 FR 19869

Internet URLs nor phone calls provide shoppers with access to disclosure information while they are shopping.¹¹

B. THE RELIANCE ON “QR CODES” AND OTHER ELECTRONIC TECHNOLOGY FAILS TO MEET THE LAW’S REQUIREMENTS AND DISCRIMINATES AGAINST MILLIONS OF AMERICANS

A descriptive label on a food package, whether using words or symbols, is already a near-perfect communication technology, as long the words used have a common understanding among consumers and the symbols are not misleading. Under an existing voluntary program, food shoppers are currently able to pick up a product, look at an on-the-package label and know immediately if it has been certified as “Non-GMO”. This approach could and should have been chosen by USDA for the national disclosure standard. With on-package labeling, shoppers can quickly and easily compare one product to another for GMO ingredients and, at the same time, compare prices and nutritional content and then decide what to buy. There are numerous academic and government studies supporting well-designed on-package labeling as an effective strategy for communicating information about food to shoppers.¹² Unsurprisingly, such simple and cost-effective on-package labels are already in use by 64 countries worldwide to inform shoppers of GMO foods.¹³

Compare this tried and true communication strategy with the USDA’s proposed disclosure standard. Instead of instantly accessing information using their eyes, U.S. shoppers will be required to purchase a smartphone, which they must bring with them when food shopping to read a QR code. They will need to understand what the QR code is for, so advertising, store signage and/or a public education campaign will be necessary to educate them. In addition, the shopper will need to know how to scan a QR code and must download an app for this purpose. To do this, their smartphone must have sufficient memory to download and use the app. For the smartphone to work as a scanner, the supermarket or other store selling food, including convenience stores and rural markets, must have functioning WiFi storewide, available to all shoppers. If the store does not have functioning WiFi, then the shopper must additionally pay for a data plan either to read the QR code or to send a text, access a website or call the

¹¹ Deloitte Consulting LLP, “Study of Electronic or Digital Link Disclosure, A Third-Party Evaluation of Challenges Impacting Access to Bioengineered Food Disclosure” (July 2017), <https://www.ams.usda.gov/sites/default/files/media/USDA%20Deloitte%20Study%20of%20Electronic%20or%20Digital%20Disclosure%200170801.pdf>, accessed June 18, 2018 (hereinafter “Deloitte”)

¹² See e.g., U.S. Food and Drug Administration, Consumer Research on Labeling, Nutrition, Diet, and Health, <https://www.fda.gov/Food/FoodScienceResearch/ConsumerBehaviorResearch/ucm275987.htm>, accessed June 19, 2018

¹³ Center for Food Safety, International Labeling Laws, <https://www.centerforfoodsafety.org/issues/976/ge-food-labeling/international-labeling-laws>, accessed June 18, 2018

manufacturer to try to get the information in another way. Further, the phone's cellular signal must work inside the store building. A store could install its own scanners, but these work only with WiFi, so they are not an alternative to it. To be functionally equivalent to on-label information, those scanners would have to be installed within easy access to all shelves throughout the store, not just at the check-out counters. Otherwise, the shopper will be unable to compare products and will be trundling his or her shopping cart back and forth to try to get the information and put food back on the shelf if they do not want GMO ingredients.

While Congress allowed the option of providing GMO information through an "electronic or digital link," that authorization was not without limits. The disclosure standard must be consistent with the U.S. Constitution, and it must address the findings of a mandated study on the technological challenges to electronic access.¹⁴ The proposed rule fails on all counts. USDA has proposed a Rube Goldberg scheme that is functionally ineffective, discriminatory and unsupported by the evidence. The proposed rule discriminates against people in rural communities and others without access to affordable broadband (according to the FCC, 34 million Americans lack access to advanced broadband service).¹⁵ It also discriminates against people who do not have a smartphone by choice or who cannot afford one (23 percent of Americans do not own a smartphone)¹⁶ or who cannot consistently afford a sufficient data plan. Indeed, the Deloitte report concedes these discriminatory impacts: "Technological challenges have a disproportionate impact on certain consumer groups. Namely, of those who are interested in accessing bioengineering disclosure, low-income populations, rural residents, and consumers over the age of 60 are more likely to lack the tools and broadband services needed to effectively access and electronic or digital link."¹⁷

Strikingly, Deloitte found that the QR code technology didn't work *even when consumers had a smartphone and effective Internet access*. Eighty-five percent of Americans have not used a bar code or QR code to access product information in the past year, and even with hands-on instruction as part of the study, many were flummoxed as to how to download an app to read the code and how to scan the code once the app was installed.¹⁸

The proposed rule fails to address civil rights concerns. In its civil rights review, USDA concludes that the rule "would not deny any persons or groups the benefits of the program or subject any persons or groups to discrimination."¹⁹ This is patently untrue. Older people, African Americans, Latinos and Native Americans disproportionately lack

¹⁴ 7 U.S. Code § 1639b(c)(1)

¹⁵ Deloitte at p. 55

¹⁶ Deloitte at p. 46

¹⁷ Deloitte at p. 61

¹⁸ Deloitte at p. 62-63

¹⁹ 83 FR at 19880 (May 4, 2016)

access to adequate smartphone service. Six in ten older Americans in 2017 did not own a smartphone and, as the Pew Research Center reports, “There remains a notable digital divide between younger and older Americans. And many seniors who are older, less affluent or with lower levels of educational attainment continue to have a distant relationship with digital technology.”²⁰ According to 2015 Pew Research Center data, of the 64 percent of U.S. citizens then owning a smartphone, 23 percent cancel or suspend service due to financial constraints. Minority populations are particularly impacted. Pew found that “Along with lower-income users, African Americans and Latinos are around twice as likely as whites to have canceled or cut off their smartphone service,” and African Americans also disproportionately experience functionality problems with smartphones, including apps that don’t work properly or running out of data during the month.²¹

Likewise, Native Americans disproportionately lack access to functioning broadband. USDA’s own report details FCC data showing that 1.9 million people living in tribal lands (41 percent) lack access to broadband at levels sufficient to load a disclosure Web site (a very low standard of 10 Mbps).²² Figure 2 in the Deloitte report, “Limited Broadband Access Map for the United States, by County,” clearly shows Alaska’s Arctic Region and the Southwest Tribal Region with inadequate or no broadband. The report notes that several tribal communities are particularly interested in knowing about GMO foods and in avoiding these foods.²³

The proposed rule discriminates against people in rural areas. While rural Americans may not comprise a protected class under civil rights laws, they nevertheless should be provided the same access to GMO disclosures as residents of urban and suburban areas. Yet as the USDA-commissioned Deloitte report makes clear, these residents are disadvantaged by the agency’s proposal in multiple ways. The report cites FCC data establishing that 88 percent of the 1,020 counties with inadequate broadband are mostly or completely rural, representing 15.8 million rural Americans and 38 percent of the rural population.²⁴ The Deloitte study found that rural respondents surveyed in its study frequently commented on poor broadband access, with 22 percent mentioning access issues, and many noting that “grocery stores were in the middle of broadband ‘dead zones’.”²⁵ This lack of access is exacerbated by limited WiFi availability in rural food stores. The Deloitte report concludes, “Rural retailers are less likely to have

²⁰ Monica Anderson and Andrew Perrin, Pew Research Center, “Technology use among seniors,” May 17, 2017, <http://www.pewinternet.org/2017/05/17/technology-use-among-seniors/>, accessed June 18, 2018

²¹ Aaron Smith, Pew Research Center, “U.S. SMARTPHONE USE IN 2015, Chapter One: A Portrait of Smartphone Ownership,” April 1, 2015, <http://www.pewinternet.org/2015/04/01/chapter-one-a-portrait-of-smartphone-ownership/>, accessed June 18, 2018

²² Deloitte at p. 55

²³ Deloitte at p. 28-29

²⁴ Deloitte at p. 55

²⁵ Deloitte at p. 56

broadband access, and small retailers will struggle to make costly investments in WiFi networks. As a result, consumers who shop at these stores will face difficulties accessing digital disclosures.”²⁶ This actually understates the reality. Only 37 percent of independently operated retail food outlets provide WiFi in-store, and the report found in its on-the-ground site visits that in a rural Appalachian town none of the retailers, including large national chain stores, offered WiFi to the public. Shoppers in tribal areas had a similar experience.²⁷

The proposed rule fails to comply with the prohibition on marketing and data collection. In Subtitle E, Congress prohibited “marketing and promotional material” on the product information page accessed through electronic means, and also prohibited the collection, analysis and sale of any personally identifiable information about consumers collected through the link.²⁸ This prohibition is completely subverted by the need for almost all consumers to download a smartphone app in order to access the GMO disclosure. The Deloitte study found over 700 commercially available QR or bar code scanning apps. Many of these simply didn’t work for their intended purpose. The apps were so confusing and poorly functioning as to cause users to abandon their efforts to access information through the QR code link. The users’ difficulties were exacerbated by pop-up ads that redirected them to unrelated commercial websites. Deloitte found that 40 percent of the observed study participants “struggled to navigate and troubleshoot apps with advertisements.”²⁹ Unfortunately, virtually all of these scanning apps contain such ads. As the report states, “these apps are generally not designed for information access; they are designed for revenue generation. As such, they are incentivized to include advertisements so as to garner profit.”³⁰ These apps almost certainly obtain personal information from consumers, a practice prohibited by Subtitle E.³¹ The Deloitte report concludes that hundreds of apps “operate counter to the intent of the law.”³² USDA’s proposed rule avoids addressing any of these issues, ignoring its own report and the requirements of the law. This is unacceptable.

The proposed rule fails to provide comparable non-electronic disclosure options. The proposed rule fails to meet the law’s requirement to provide “additional and comparable options” that are not electronic or digital to consumers to access the

²⁶ Deloitte at p. 21

²⁷ Deloitte at p. 59

²⁸ 7 U.S.C. § 1639b(d)(2)-(3)

²⁹ Deloitte, Figure 7 at p. 52

³⁰ Deloitte at p. 53

³¹ See, e.g., Abbas Razaghpanah et al, “Apps, Trackers, Privacy, and Regulators: A Global Study of the Mobile Tracking Ecosystem,” Network and Distributed Systems Security Symposium 2018, February 2018, San Diego, CA, USA, ISBN 1-1891562-49-5, <http://dx.doi.org/10.14722/ndss.2018.23353>, accessed June 20, 2018

³² Deloitte at p. 23

disclosure.³³ As the USDA-commissioned study of digital and electronic disclosure makes abundantly clear, these mechanisms, unlike disclosure through on-package text and/or symbols, *just don't work*. While QR codes and other digital or electronic links may be useful in providing additional information not required to be disclosed by law, these tools by no means ensure consistent national disclosure as mandated by Congress. Further, reliance on digital or electronic links unlawfully discriminates against protected classes. There is only one possible finding the Secretary can make based on the Deloitte report: "Consumers, while shopping, would not have sufficient access to the bioengineering disclosure through electronic or digital disclosure methods." Under 1639b(c)(4) of the disclosure law, under these circumstances, the Secretary "shall provide additional and comparable options to access the bioengineering disclosure." The simplest and most cost-effective option, which works equally well in rural and urban areas alike, and doesn't require consumers, retailers or manufacturers to purchase additional equipment, is the on-package label that uses either text or a symbol to identify the product as containing GMO ingredients.

C. THE COSTS AND BENEFITS OF THE DISCLOSURE STANDARD HAVE BEEN INADEQUATELY ASSESSED AND DO NOT SUPPORT THE RULE AS PROPOSED

USDA states in the proposal: "Regulations must be designed in the most cost-effective manner possible to obtain the regulatory objective while imposing the least burden on society."³⁴ The agency then proceeds to ignore its own directive and design a regulation that fails to achieve the regulatory objective (informing consumers), while imposing the greatest burden on society (consumers, retail food establishments and manufacturers). The proposed rule only considers the cost to manufacturers and to those retailers who must label bulk foods. It correctly states that the cost of modifying package labels is a one-time expense, with some additional ongoing expenditures to maintain paperwork to demonstrate compliance. If the proposed rule required traditional on-package label disclosure with text or a symbol, both of which can be read and understood without additional equipment, this statement of costs would be adequate. But the proposed rule instead relies on digital and electronic links, which the agency's own study concludes will not work without significant additional expenditures, mostly but not entirely incurred by consumers and food retailers. These additional societal costs are not reflected in the cost-benefit analysis.

The cost shift onto consumers resulting from the agency's choice of digital instead of on-package disclosure includes the cost of personal smartphones and data plans.

³³ 7 U.S.C. § 1639b(c)(4) reads: "**Additional disclosure options.** If the Secretary determines in the study conducted under paragraph (1) that consumers, 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 access the bioengineering disclosure."

³⁴ 83 FR at 19881

Consumers will only be able to access the GMO disclosure if retailers invest in WiFi and make it publicly available throughout their stores and also invest in scanners for those without smartphones. Yet the proposed rule doesn't require retail establishments to invest in this equipment, further undermining the disclosure standard's effectiveness. If retailers do not make these investments voluntarily, the Deloitte study found that, "a heavy burden will be placed on consumers who want to know information about the food that they purchase."³⁵ The Deloitte study found the costs for retailers to invest in such equipment are "significant" and "may prove cost prohibitive, particularly for small and rural retailers. In addition, there are limited benefits due to limited consumer knowledge around digital disclosure."³⁶ Of course, it is precisely those small and rural stores that currently lack WiFi capability and would have to invest if the proposed disclosure standard were to actually provide information to residents of rural America; the study found that only 37 percent of independently owned stores have WiFi availability, "likely due to high capital costs associated with this infrastructure."³⁷ The report also points out that these same retailers are already struggling to survive with ever-narrowing profit margins.³⁸

The bottom line is USDA ignores most of the costs associated with implementing GMO disclosure through electronic and digital links. Instead of choosing a regulatory approach that balances costs and benefits by maximizing effectiveness and minimizing costs, it has done the opposite—selecting an option that is both ineffective and expensive.

D. THE LABEL DESIGN AND NOMENCLATURE APPEAR INTENDED TO CONFUSE AND DO NOT COMPLY WITH THE LEGAL REQUIREMENT OF NEUTRALITY

Requiring "bioengineered" or "BE" instead of "GE," "genetically engineered" or "GMO" will confuse, not inform. The term "bioengineered" and the abbreviation "BE" are unfamiliar to consumers. These terms are inconsistent with existing voluntary certification labels, consumer expectations and international norms, a fact tacitly recognized in another part of the rule where food certified as organic would be allowed to use the "Non-GMO" label.

In addition, the proposed symbols, which incorporate suns and/or "smiley faces," fail to comply with the law's mandate that the disclosure standard be neutral with respect to whether a bioengineered food is safer than or less safe than its non-bioengineered counterpart. The proposal to use cartoonish characters in a food disclosure label will undermine consumer trust and lead to confusion, rather than assure neutrality. A simple on-package label stating "Contains GE" or "GMO" will much more effectively convey the required information and do so in a neutral manner. This premise is borne

³⁵ Deloitte at p. 20

³⁶ Deloitte at p. 67

³⁷ Deloitte at p. 59

³⁸ Deloitte at p.21

out by a recent scientific study, which found that the straightforward on-package GMO labeling in place in Vermont before the state's law was preempted resulted in a *reduction* in consumer opposition to GE food.³⁹

E. THE PROPOSED RULE IS INCONSISTENT WITH INTERNATIONAL NORMS AND WILL PROMOTE TRADE DISPUTES

Congress directed that the disclosure standard should be implemented in a manner consistent with international obligations.⁴⁰ Yet, several provisions of the proposed rule are inconsistent with international norms. Under USDA's proposed labeling scheme, U.S. products would have to be re-labeled to comply with other countries' requirements in order to be exported, and the lack of consistency will promote trade disputes. Some of the provisions of USDA's proposal that raise international trade concerns include:

- Of the 64 countries requiring GE food labeling, all have on-package disclosure rather than hiding information through a QR code or another electronic link.
- The term "BE" is not commonly used around the world; other countries use "GMO" or "GE."
- Other countries do not limit disclosure to whole foods and neglect to inform consumers of GE ingredients such as corn syrup, corn starch and oils.
- Two of the options proposed by USDA as the threshold for disclosure are inconsistent with international norms; only "Alternative 1-B" setting a .9 percent threshold is consistent with policies of trading partners.
- The proposed definition of what constitutes bioengineered food, which would not cover newer forms of genetic engineering such as gene editing, is inconsistent with Codex Alimentarius standards for foods derived from biotechnology. The USDA cannot simply ignore the Codex standards to which it has subscribed and which are presumed to be authoritative for World Trade Organization members.

F. COMPLIANCE IS UNREASONABLY DELAYED

The proposed rule unreasonably delays implementation and compliance requirements. Congress required that USDA adopt rules implementing the disclosure standard no later than July 29, 2018. USDA proposes to delay compliance requirements until 2020, with small manufacturers given until 2021 to comply. USDA also proposes that companies be allowed to use up existing labels that lack disclosure information so long as they are on products placed into the stream of commerce by January 1, 2022. In other words, under

³⁹ Jane Kolodinsky and Jayson L. Lusk, "Mandatory labels can improve attitudes toward genetically engineered food," *Science Advances*, June 27, 2018: EAAQ1413, <http://advances.sciencemag.org/content/4/6/eaag1413/tab-pdf> (see Attachment).

⁴⁰ 7 U.S.C. § 1639c(a)

this scenario, six years after Congress mandated bioengineered food disclosure, the information still won't be provided to consumers throughout the marketplace. Moreover, allowing continued use of non-complying labels will confuse consumers, who will find similar products labeled differently. Meanwhile, the 2016 law immediately preempted state GMO disclosure laws already enacted and prohibited new state laws, so there is no recourse for consumers during this long, unreasonable compliance delay.

Thank you for your consideration of these comments.

Respectfully submitted,

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