

# GMO Labeling Bill Sets National Disclosure Standard

Congress has established a national scheme for the mandatory disclosure of genetically modified organism ("GMO") ingredients on food labels, preempting efforts by state and local governments to set their own standards. In late July, President Obama signed Senate Bill 764<sup>[1]</sup> into law, which requires food manufacturers to disclose the presence of genetically modified ingredients in labels.

The law directs the U.S. Department of Agriculture (the "USDA") to draft regulations to "establish a national mandatory bioengineered food disclosure standard with respect to any bioengineered food and any food that may be bioengineered," and gives the USDA two years to promulgate such rules. That bill requires the disclosure on food packaging to be made in a text label, a symbol or an electronic or digital link—a QR code—that can be scanned by a mobile device and will direct the consumer to the bioengineering disclosure.

There are potentially significant implications for both food manufacturers and consumers under the law, but much of the impact still depends on the substance of the USDA regulations. For now, here is what the food industry and food shoppers should know:

## USDA Regulatory Authority

The law gives the USDA the authority to determine what amount of bioengineered substance may be present in a food for it to be considered a "bioengineered food," and directs the USDA to establish a process to issue determinations on whether a food is considered bioengineered. Much of the law's impact will be determined by how the USDA exercises its authority, and the full scope of the federal standard will not be known until the rulemaking process plays out.

For example, the bill defines bioengineered food as that which "contains genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques" which "could not otherwise be obtained through conventional breeding or found in nature." It is not clear how the USDA will treat highly processed food products in which modified genetic material is no longer detectable after processing. The USDA regulations may also address the standard for determining whether modified genetic material could be obtained through conventional breeding or found in nature.

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The USDA will likely also have to tackle the standard for sufficient "electronic or digital" disclosures under the law. The law directs the USDA to study "potential technological challenges" to disclosures made by scanned QR codes, including availability of cellular or wireless networks, costs and benefits of installing digital link scanners in retail stores, and the availability of landline telephones in stores for consumers to call and receive bioengineering disclosures (the law provides that digital links should be accompanied by a telephone number through which the disclosure may be obtained). If the USDA determines that shoppers might not have sufficient access to the electronic or digital bioengineering disclosures, the law states it should consult with food retailers and manufacturers to identify "additional and comparable" disclosure methods.

## State Law Preemption

Because the law's purpose is to establish a national disclosure standard, it specifically prohibits state and local governments from setting any labeling or disclosure requirement regarding bioengineered food that is not "identical" to the national standard. In doing so, the law preempts state laws such as Vermont's GMO labeling requirement, which went into effect July 1. The Vermont law had been challenged in federal court by the Grocery Manufacturers Association, but that case was jointly dismissed by the state and the plaintiff this month in acknowledgement of the law's preemption. Laws in other states—such as Maine and Connecticut—which had not yet gone into effect are likewise preempted.

It remains to be seen whether states and municipalities will still attempt to set bioengineered food disclosure requirements for products not covered by the federal law, such as food served in restaurants.

## Conclusion

There will be little change for shoppers and food manufacturers until the USDA concludes its rulemaking process, but there will be ample opportunity for both industry and consumer groups to provide input on that process during the public comment period on draft rules. Reinhart Boerner Van Deuren's Food and Beverage Team will continue to monitor the rulemaking process as the USDA further defines this national GMO disclosure standard.

If you would like to know more about how food and beverage legislation may affect your business, please contact your Reinhart attorney or any member of the firm's Food and Beverage Team. Reinhart's Food and Beverage Team can provide



you with consulting and litigation expertise relating to state and federal regulations, including food labeling and packaging compliance, food recalls, food safety issues and supply chain analysis.

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[1] The text of the bill can be found here:

<https://www.congress.gov/114/plaws/publ216/PLAW-114publ216.pdf>.

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