



#### 2018 Board of Directors

Vanessa Bialobreski  
Farm to Table Event Co.  
Columbia, SC

Ciranna Bird  
Raleigh, NC

Amy Brooks  
Brooks Contractor  
Goldston, NC

Ardis Crews  
SOFFA  
Henderson, NC

Ben DuBard - Secretary  
W.P. Rawl & Sons  
Blythewood, SC

Robin Kohanowich  
Central Carolina Community College  
Pittsboro, NC

Jennifer Lapidus  
Carolina Ground, LLC  
Asheville, NC

Martha Mobley  
Meadow Lane Beef, LLC  
Louisburg, NC

Fred Miller  
Hilltop Farm  
Willow Springs, NC

Joe Mosnier  
Chapel Hill, NC

Roddy Pick – Vice President  
Greenbrier Farm  
Easley, SC

Amy Poirier  
Hoffner Organic Farms  
Mt. Ulla, NC

Robert Rockwell - President  
Charlotte, NC

Clay Smith  
Redbud Farm, Certified Organic  
Burlington, NC

Patrick Wagner - Treasurer  
Greenville Technical College  
Greenville, SC

June 22, 2018

Mr. Bruce Summers, Administrator  
Agricultural Marketing Service  
United States Department of Agriculture  
1400 Independence Ave. SW  
Room 4543-South  
Washington, DC 20250

Docket Number AMS-TM-17-0050

**Submitted electronically via <http://www.regulations.gov>**

Re: Comments on the proposed rule under the NBFDS

Mr. Summers:

The Carolina Farm Stewardship Association (CFSA) is a member-based 501(c)(3) organization representing 3,000 farmers, businesses and consumers in North and South Carolina, with a mission to build, advocate for, and educate about the systems to support a sustainable regional food system centered on organic agriculture and local food.

Founded in 1979, CFSA is the oldest sustainable agriculture organization in the Southeast. Our farm and business members range from the largest organic egg processors in the nation to small-scale operations selling organic eggs and poultry through direct marketing; from mid-scale dairy and grain farms selling in organic commodity markets to slaughter facilities serving independent farmers; and from five-plus-generation farm families to young people from urban backgrounds and second-career farmers who have transitioned from successful businesses in non-food industries. This diverse membership means that we are able to bring a wide range of farming and food experience and knowledge to bear in forming policy positions.

CFSA is also a member of the National Sustainable Agriculture Coalition (NSAC), a nationwide alliance of grassroots organizations that advocates for federal policy reform to advance the sustainability of agriculture, food systems, natural resources, and rural communities. As a coalition member, CFSA works alongside other stakeholder organizations to develop NSAC's policy positions, including those pertaining to genetic engineering and food labeling. In addition to urging AMS to follow the recommendations found in NSAC's public comments on the proposed NBFDS rule, CFSA respectfully submits the following comments and recommendations:

## **(1) Introduction**

The National Bioengineered Food Disclosure Standard (NBFDS) was passed by Congress in July 2016 in order to pre-empt the implementation of state-level GMO-labeling laws, which was then imminent. The provisions of the law represent a kind of compromise position: both during Congress's debate about the NBFDS and since its passage, the law has been criticized by those who sought the most stringent possible labeling requirements for genetically engineered (GE) foods, and it has been criticized by farmers and manufacturers who sought voluntary labeling requirements, or none at all. Neither camp is satisfied.

Congress has given AMS the task of further articulating a balance between the concerns of American consumers, a majority of whom support mandatory labeling of genetically engineered food, and the concerns of farmers and manufacturers who must comply with the new labeling requirements. In this endeavor, AMS is of course constrained by the statutory language of both the NBFDS and the Administrative Procedures Act.

It is vital to *all* stakeholders within the American food system that AMS's final rule provides consumers with unambiguous, easy-to-understand information about whether food products contain ingredients produced using GE technology. The worst possible outcome—for consumers, farmers, and manufacturers alike—is marketplace confusion.

Biotechnology is complicated. And yet, the expectation of consumers about the labeling of genetically engineered food is comparatively simple. If food ingredients are derived from plants containing genes that were added, deleted, or otherwise altered using targeted genetic engineering in a laboratory, consumers expect these ingredients to be labeled “GMO” or “genetically engineered.”

It must be noted that underlying this singular consumer expectation are a host of concerns about the economic, agronomic, and environmental impacts that are known to accompany the complementary and intensive uses of genetically engineered crops, synthetic pesticides, and synthetic fertilizers—collectively, the “biotechnology package.”

For example, research has shown that specific practices and inputs that are part of the biotechnology package can contribute to increased weediness,<sup>1</sup> damaging genetic<sup>2</sup> and

---

<sup>1</sup> See Evans, JA et al, “Managing the Evolution of Herbicide Resistance” *Pest Management Science* (May 11, 2015) <http://onlinelibrary.wiley.com/doi/10.1002/ps.4009/pdf>. See also Mortensen, DA et al, “Navigating a Critical Juncture for Sustainable Weed Management,” *BioScience* 62:1, p75-84 (Jan 2012); Owen, Micheal DK, and Ian A. Zelaya. “Herbicide resistant crops and weed resistance to herbicides.” *Pest Management Science* 61.3 (2005): 301-311.

<sup>2</sup>See e.g. Lipton, Eric. “Crops in 25 States Damaged by Unintended Drift of Weed Killer” *New York Times* (Nov. 1 2017), <https://www.nytimes.com/2017/11/01/business/soybeans-pesticide.html>; Steil, Mark. “Minn. farmers’ harvest hit hard by drifting weed killer,” *MPR News* (Nov. 13 2017), <https://www.mprnews.org/story/2017/11/13/minn-farmers-harvest-hit-hard-by-drifting-weed-killer>.

particulate drift<sup>3</sup>, and deterioration of soil quality. These negative externalities have the potential to impact the bottom line of *all* producers. Those who do not use GMO inputs face the risk of crop damage from pesticide particulate drift and/or lost markets due to genetic contamination. Those who do use GMO crops face the longer-term impacts of degraded soil from increased fertilizer and herbicide use and impacts on pollinator habitat,<sup>4</sup> all of which make farming a costlier, riskier enterprise.

In other words, consumers are not concerned *only* about what's in their food. They are also concerned about the wider impacts of the processes and systems that produced that food. The NBFDS is designed to provide consumers with information about how a particular purchase relates to these wider processes and systems, thereby enabling consumers them to meaningfully vote with their dollars.

Labeling rules which have the potential to mislead consumers, or which provide incomplete information, risk further undermining consumer trust in the American agricultural system. This outcome would be contrary to any reasonable interpretation of the intent of Congress in passing the NBFDS, and it must be avoided at all costs.

## **(2) Applicability : What is to be disclosed?**

### **A. AMS should require use of “GMO” and “genetically engineered” instead of the less familiar term “bioengineering.”**

Because the terms “GMO” and “genetic engineering” are already understood by consumers to mean that a food product was manufactured using gene-altering biotechnology, the term “bioengineering,” as proposed by Congress in the NBFDS, does not serve to make product labeling clearer for consumers. AMS’s subsequent decision to allow *only* the term “bioengineering” is completely unreasonable.

---

<sup>3</sup> See e.g. Lipton, Eric. “Crops in 25 States Damaged by Unintended Drift of Weed Killer” New York Times (Nov. 1 2017), <https://www.nytimes.com/2017/11/01/business/soybeans-pesticide.html>; Steil, Mark. “Minn. farmers’ harvest hit hard by drifting weed killer,” MPR News (Nov. 13 2017), <https://www.mprnews.org/story/2017/11/13/minn-farmers-harvest-hit-hard-by-drifting-weed-killer>.

<sup>4</sup> See e.g. Pleasants, JM and KS Oberhauser. “Milkweed loss in agricultural fields because of herbicide use: effect on the monarch butterfly population.” Insect Conservation and Diversity (2012), available at [http://www.mlmp.org/results/findings/pleasants\\_and\\_oberhauser\\_2012\\_milkweed\\_loss\\_in\\_ag\\_fields.pdf](http://www.mlmp.org/results/findings/pleasants_and_oberhauser_2012_milkweed_loss_in_ag_fields.pdf); <http://www.nrcs.usda.gov/wps/portal/nrcs/detail/plantmaterials/home/?cid=STELPRDB1256245>; [http://www.epa.gov/oppfead1/cb/csb\\_page/updates/2015/protecting-monarch-butterfly.html](http://www.epa.gov/oppfead1/cb/csb_page/updates/2015/protecting-monarch-butterfly.html); UN Intergovernmental Science Policy Platform, available at: <http://www.ipbes.net/article/press-release-pollinators-vital-our-food-supply-under-threat>.

Congress gave AMS authority to use terms other than and instead of “bioengineered” in the required label disclosures. AMS should reject use of this term altogether because it does not align with the most basic and reasonable expectations of consumers.

If AMS instead chooses to allow use of the term “bioengineered” in label disclosures, it should modify the proposed text disclosure so that it clearly states that the term “bioengineered” is, for the purposes of this labeling standard, synonymous with the terms “GMO” and “genetically engineered,” and AMS should allow farmers, manufacturers, and retailers to use either of these more familiar terms instead of “bioengineering,” should they wish to do so.

**B. The definition of “bioengineered food” should be interpreted to include food products derived from plants developed using a broad range of biotechnology, including new gene editing techniques.**

In order for the proposed rule to accomplish the USDA’s stated purpose of providing a “meaningful disclosure for consumers who want more information about their food,”<sup>5</sup> the AMS must ensure that the definition of “bioengineered food” conforms to basic consumer expectations about GMO labeling. As stated above, this expectation is essentially that the words “GMO” or “genetic engineering” will be used to indicate that a food product is derived from plants which were developed using targeted, gene-altering biotechnology. Notably, this expectation does not differentiate between transgenic alterations, RNA-interference (RNAi), or newer gene-editing techniques such as CRISPR.

The USDA has previously stated that the definition of “bioengineering” under the NBFDS would allow it to include CRISPR-edited crops within the disclosure requirement.<sup>6</sup> CFSA agrees with this position, and urges the AMS to interpret the component terms “obtained through conventional breeding” and “found in nature” as pertaining not just to an expressive *outcome* of genetic modification, but also to the *process* by which it occurs. Accordingly, genetic material that is altered using transgenesis, RNAi, or other gene-editing techniques must be viewed as necessarily falling within the definition of “bioengineering,” since these processes do not occur naturally or through conventional breeding. The lists of commercially available crops in AMS’s proposed rule already reflect a variety of gene-altering technologies. CFSA applauds this expansive interpretation of “bioengineering” and urges AMS to make clear that the newest gene editing techniques will also be included as crops developed using these technologies become commercially available.

Because AMS did not provide proposed definitions of the component terms “conventional breeding” or “found in nature,” if AMS does decide to define them, this should be done through

---

<sup>5</sup> USDA Press Release, May 3, 2018 available at <https://www.usda.gov/media/press-releases/2018/05/03/usda-seeks-comments-proposed-rule-national-bioengineered-food>.

<sup>6</sup> Letter from USDA General Counsel to Senator Debbie Stabenow, July 1, 2016, available at <http://sustainableagriculture.net/wp-content/uploads/2016/07/USDA-general-counsel-letter-GMO.pdf>.

a supplemental proposed rule that provides the public with an additional opportunity to provide public comments.

**C. AMS should interpret the NBFDS as requiring disclosure for highly refined food products that are derived from genetically engineered crops, regardless of whether DNA is detectable in these products.**

To allow food products derived from genetically engineered crops to avoid disclosure because they are highly refined or processed would be fundamentally misleading.

The concept of “DNA-free food” is entirely absent from grocery store shelves—no labels or marketing materials tout such a quality, and it is doubtful that even a small percentage of consumers are aware that some highly refined products are devoid of detectable DNA segments.

On the other hand, American consumers are already familiar with the terms “GMO” and “genetic engineering,” and consumers understand these terms to refer to those food products which are or which contain material from genetically engineered crops.

Consequently, consumers reviewing a product label that complies with the proposed NBFDS rule will reasonably assume that the absence of a disclosure means that the product in question is *not* made from genetically engineered plants (assuming the product is not Organic or from a very small manufacturer). Yet if highly refined products are not subject to disclosure, this assumption will very often prove incorrect.

Allowing highly refined products made from genetically engineered plants to avoid disclosure creates an exception that swallows the rule, and it is contrary to the common understanding of consumers. CFSA urges the AMS to avoid this outcome.

**D. Under §66.5(C) AMS should use Alternative 1-B (“.9% of a specific ingredient by weight”) as the threshold for unintentional or technically unavoidable presence of genetically engineered material which would trigger disclosure.**

Across the globe, consumers are increasingly demanding that their governments require mandatory labeling for genetically engineered food. Among existing labeling frameworks, the threshold of adventitious or technically unavoidable GMO/GE presence which triggers labeling varies from country to country—many use the .9% threshold, some use 1%, some use 3%, and some do not have a *de minimis* threshold at all.

In its proposed rule, AMS points out that a threshold of .9% “may align with some existing industry standards...as well as the thresholds established by some U.S. trading partners.” Indeed, the European Union, Australia and New Zealand (major U.S. trading partners), Russia (a major U.S. competitor within international commodity markets) and the Non-GMO Project (a well-known domestic industry standard) all use a threshold of .9% for unintentional presence of genetically engineered material.

It is likely that more countries will implement labeling requirements in the future. In order to ensure that American farmers have access to the widest range of international markets, AMS should use Alternative 1-B (.9% of an ingredient, by weight). This threshold is one of the lowest used by major international trading partners and, consequently, American products that comply with a .9% threshold would likely comply with most, if not all, labeling requirements administered in foreign markets. On the other hand, if Alternative 1-A (5% of an ingredient, by weight) were used instead, American manufacturers would face the prospect of having their exempt products rejected as non-compliant in the E.U. and elsewhere, even though they were properly labeled in the United States.

Alternative 1-C, which would allow for the intentional use of genetically-engineered ingredients without triggering disclosure, is entirely unacceptable. This proposed alternative undermines the core purpose of the mandatory disclosure standard.

**E. Intentional use of material from GE-crops on the non-highly adopted list should preclude a responsible party from using the word “may” in the required disclosure.**

CFSA recommends that the final NBFDS rule prohibit the use of the word “may” in any disclosure if the entity subject to the disclosure has knowingly used ingredients derived from genetically engineered crops, even if those crops are listed on the “non-highly adopted” list.

The NBFDS rule should expressly state that in the event of such intentional use, nothing in the NBFDS or related federal regulations prevents the FDA or other federal agencies from enforcing existing laws which prohibit false or misleading labeling of products.

We must reiterate: failure to require accurate disclosure for the intentional use of such ingredients is contrary to the fundamental purpose of the law, it is contrary to the reasonable expectations of consumers, and it can harm industry.

**(3) Who must disclose?**

CFSA supports AMS’s proposed definition of “very small manufacturers” (i.e. those with less than \$2.5 million in annual sales). Given the relatively small percentage of products for which these manufacturers are responsible, it is appropriate for them to be exempt.

Small-scale food processing businesses are a vital link between farmers and consumers in the development of local and regional food systems. In some cases, farmers themselves choose to expand their operations by producing value-added food products that can be sold at local farmer’s markets or retail stores. These small businesses are the lifeblood of many rural communities, but they face significant challenges in producing food that is price-competitive with the products of highly-capitalized, vertically-integrated food manufacturers.

Government regulations should be tailored to avoid disproportionately affecting the economic viability of smaller businesses, particularly where such firms are responsible for only a small fraction of the total volume of regulated acts. AMS's proposal to exempt from the NBFDS those firms with less than \$2.5 million in annual receipts is a well-struck balance between the interests of small businesses and the interests of consumers.

#### **(4) What will the disclosure look like?**

##### **A. Text disclosure should require use of the terms “GMO” and/or “genetic engineering,” and the word “may” should not be allowed for intentional use of GE ingredients.**

As discussed above, AMS should (1) require disclosure to be made using the terms “GMO” or “genetic engineering” instead of the less familiar term “bioengineering” and (2) require that any knowing use of ingredients which are or which are derived from genetically engineered crops be accompanied by an unambiguous statement in the text or symbol disclosure that the product is or contains genetically engineered material. Use of the word “may” in a text or symbol disclosure should be prohibited if a manufacturer intentionally uses genetically engineered ingredients, regardless of whether the ingredients are from “highly adopted” or “non-highly adopted” crops.

##### **B. AMS's proposed symbols are pretty, but they are also contrary to law.**

The NBFDS law is clear: genetically engineered foods which are subject to mandatory disclosure “shall not be treated as safer than, or not as safe as, a non-bioengineered counterpart of the food solely because the food is bioengineered or produced or developed with the use of bioengineering.” Given this unequivocal statutory language, at least some of AMS's proposed symbols are contrary to law.

The symbols available for use in making the required disclosure must be neutral. AMS's proposed symbols which appear to be smiling completely flout the intent of Congress. Those which depict sunshine and a placid blue sky are better, but they too are inappropriately cheerful.

CFSA would recommend that the AMS look to the USDA Organic seal for an in-house example of a neutral symbol. The Organic symbol is understated and discrete; there is no effort to convey a sense of bonhomie. It displays only an abstract image of a cultivated field, without smiley faces, blue skies, or sunshine.

CFSA recommends that AMS use a plain, circular symbol containing a silhouette of a corn plant, accompanied by text that says GMO or GE. Further, the symbol should be created using a maximum of two colors, one of which must be black or white and one of which must be green, blue or red.

**C. AMS should reject the electronic/digital disclosure option based on the findings in the Deloitte study; for similar reasons, the proposed text message option is not a viable alternative.**

AMS's proposed rule states that its commissioned study of the QR-code labeling option, conducted by Deloitte, is still under review. The proposed rule does not state which parts of the study are still being reviewed, or why.

The results of the Deloitte study are clear enough: while a majority of Americans own smart phones, a *significant minority* (23%) do not. Furthermore, the study found that most Americans don't know what QR codes are, which means that they are also unlikely to know that a QR code is something that they can scan with their *phones*. To make matters worse, the Deloitte study found that the vast majority of those participants who attempted to use a smart phone to scan a QR code experienced technical difficulties while doing so.

AMS has also proposed a text message disclosure option (presumably as an alternative to the QR code option, given the above-mentioned problems). As with the QR code option, accessing information by text message requires a consumer to be in possession of a mobile phone. This is unjustifiably discriminatory toward elderly and low-income members of society. Furthermore, many low-income consumers who do have cell phones have phone plans that do not provide unlimited text messaging—rather, they pay by the text. For these consumers, accessing a text message disclosure would cost them money, contrary to the plain language of the NBFDS.

Neither the QR code option nor the text message option provides any benefit to consumers, regardless of whether they own smart phones or are tech-savvy. Rather, these are concessions to manufacturers who would rather not make a disclosure at all. The goal of these electronic options is not to lower costs for manufacturers; it is to ensure that fewer consumers are able to access the information provided by a text disclosure. Accordingly, these options do not represent viable compromises between the legitimate interests of consumers and the legitimate interests of food producers/manufacturers. CFSA urges AMS to reject both options.

**(5) Impact on Other Labeling Claims**

**A. The NBFDS rule should make clear that exemption from the disclosure requirement does not, by itself, allow a regulated entity to make a claim that its product is “GE-free” or “GMO-free.”**

The NBFDS makes clear that a manufacturer may not claim that a product is “not bioengineered” simply because it is not subject to the disclosure requirement. Yet the proposed rule is silent on this point. We urge AMS to reinforce this requirement in the final rule because of the potential for abuse in the marketplace.



For example, the NBFDS rule states that animals intended for human consumption which are fed GMO-feed are not, by this fact alone, considered genetically engineered. Yet, this exemption from the labeling requirement does not allow these products to be labeled as “non-GMO,” “GE-free,” or any similar term. To help avoid consumer confusion, AMS should unequivocally state this regulatory principle in the final rule.

**B. AMS’s final rule should clearly state that USDA certified Organic products may claim to be “non-GMO” or “non-genetically engineered.”**

The NBFDS law grants the Secretary authority to “consider establishing consistency between (1) the national bioengineered food disclosure standard established under this section, and (2) the Organic Foods Production Act of 1990 (7 U.S.C. 6501 et seq.) and any rules or regulations implementing that Act.” The law also makes clear that USDA Organic products, by virtue of their Organic certification, *are* entitled to make an “absence” claim as “non-bioengineered,” “non-GMO,” or other similar term.

However, AMS’s proposed rule does not mention this provision of the authorizing statute pertaining to Organic products. Furthermore, AMS’s proposed rule does not clearly state that Organic products may use the terms “non-GMO” or “not genetically engineered” (as opposed to “not bioengineered”) when making such an absence claim. CFSA urges AMS to expressly allow Organic products to use the terms “non-GMO” or “non-GE/not genetically engineered,” in addition to or instead of “non-BE/bioengineered.”

**(6) Conclusion**

CFSA appreciates the opportunity to provide these comments. While we understand that AMS must balance the interests of consumers and industry in crafting regulations, we implore AMS to reject any possible rules which would have the effect of misleading consumers or making access to the required disclosure unnecessarily difficult for certain demographic groups. We firmly believe that such an outcome has the potential to harm consumer confidence and industry alike. Establishing clear, commonsense labeling rules is the only way forward.

Sincerely,



Roland McReynolds  
Executive Director  
Carolina Farm Stewardship Association