

Bioengineered Food Disclosure Rulemaking Update

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2018 IFT Food Policy Impact
February 6, 2018

Federal Disclosure Law: Background

- Law passed Senate and House in July 2016
- Authored by Senators Pat Roberts (R-KS) and Debbie Stabenow (D-MI)
- Strong bipartisan votes
 - House 306-117
 - Senate 63-30
- Signed by President July 29, 2016
- Senate Agriculture Committee Report, Dec. 9, 2016 (114-403)

Federal Disclosure Law: Key Concepts

➤ UNIFORMITY

- Requires **Secretary of Agriculture** to establish a national, uniform **disclosure** standard for food intended for human consumption that is or may be “bioengineered”

➤ PREEMPTION

- Prevents states and local governments from establishing or enforcing disclosure or labeling requirements except those that are identical to the national standard

Federal Disclosure Law: Key Concepts

DISCLOSURE REQUIRED:

- Food subject to FDA labeling requirements under FFDCA
- Food subject to USDA labeling requirements (meat, poultry, eggs), but only if:
 - most predominant ingredient of food independently subject to FDA labeling requirements; or
 - most predominant ingredient is broth, stock, water, or similar solution; and 2nd most predominant ingredient independently subject to FDA labeling requirements

Federal Disclosure Law: Key Concepts

DISCLOSURE NOT REQUIRED:

- Food served in restaurants or similar retail food establishments
- Very small food manufacturers
- Food with meat, poultry, egg product as main ingredient
- Food with broth, stock, water, or similar solution as main ingredient if 2nd most predominant ingredient is not independently subject to FDA labeling requirements
- Food solely because it is derived from animals that consumed bioengineered feed
- Food not intended for human consumption

Federal Disclosure Law: Key Concepts

- Implementation by USDA under Agricultural Marketing Act
- USDA Rulemaking in 2 years (July 2018)
- Three options for disclosure by manufacturers:
 - Text on packaging
 - A symbol
 - An electronic or digital link (QR code)

Federal Disclosure Law: Key Concepts

- BIOENGINEERING: “With respect to a food, refers to a food—
 - (A) that contains genetic material that has been modified through in vitro recombinant DNA techniques; AND
 - (B) for which the modification could not otherwise be obtained through conventional breeding or found in nature”

Federal Disclosure Law: Key Concepts

- Preemption #1:
 - “[No] State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce any requirement relating to the labeling or disclosure of whether a food is bioengineered or was developed or produced using bioengineering for a food that is the subject of the national bioengineered food disclosure standard ... that is not identical to the mandatory disclosure requirement under that standard.” Subtitle E, Section 293(e).

Federal Disclosure Law: Key Concepts

➤ Preemption #2:

- “No State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food or seed in interstate commerce any requirement relating to the labeling of whether a food (including food served in a restaurant or similar establishment) or seed is **genetically engineered**....” Subtitle F, Section 295(b).

Federal Disclosure Law: Key Concepts

- State law remedies:
 - “Nothing in this subtitle, subtitle E, or any regulation, rule, or requirement promulgated in accordance with this subtitle or subtitle E shall be construed to preempt any remedy created by a State or Federal statutory or common law right.” Subtitle F, Section 296.

Federal Disclosure Law: USDA Activity

- USDA State Preemption Letter
 - Preemption of Vermont law that took effect July 1, 2016 (and others not yet in effect)
 - State AG statement of non-enforcement
 - Challenge to Vermont law dismissed
- Interagency coordination established for development of proposed rule (e.g., FDA, USTR)
- Policy Memo to Ensure Consistency Between Labeling Programs (Sept. 19, 2016)

Federal Disclosure Law: USDA Activity

- 30 “Proposed Rule Questions Under Consideration”
 - Issued June 26, 2017; comment period closed August 25, 2017
 - Received over 112,000 responses
 - Submissions available on USDA’s website: <https://goo.gl/R9jyw6>

Federal Disclosure Law: USDA Activity

- ▶ 30 “Proposed Rule Questions Under Consideration”
 - Sticky areas include:
 - Scope
 - Refined ingredients
 - Threshold
 - Specific disclosure requirements (wording, symbols, etc.)
 - Foods sold in bulk, vending machines, online
 - Small food packages/manufacturers
 - Non-GMO claims
 - Compliance

Federal Disclosure Law: USDA Activity

- Access/retailer Study (Sept. 6, 2017)
 - Conducted by Deloitte
 - Consumers will face challenges in using devices
 - Broadband availability
 - Apps – space/usability
 - Lack of awareness about the link
 - Lawsuit filed to enforce deadline; mooted by USDA action

Federal Disclosure Law: USDA Activity

- Proposed Rule:
 - Cleared USDA, received by OMB on December 27
 - Listed as “economically significant”
 - OMB has 90 days to review
 - Some meetings
 - Publication may come as early as February
- Final rule
 - Due July 2018

Federal Disclosure Law: Issues to Watch

- Potential for challenges to final rule
- State/local efforts to test preemption provisions
 - Rhode Island: “posting” bill
 - “Unless otherwise clearly indicated, all of our food products contain genetically modified organisms.”
 - Mississippi: USDA parallel program
 - Washington: tax incentives to disclose
 - Colorado labeling initiative
- Enforcement under State law

Questions?

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