

Updates

April 25, 2024

Bioengineered Foods: USDA Solicits Comments on Potential Revisions to Digital Disclosure Option



USDA's Agricultural Marketing Service (USDA-AMS) recently published a [Request for Information](#) soliciting stakeholder input on the electronic or digital link disclosure option for bioengineered (BE) foods under the National Bioengineered Food Disclosure Standard (Disclosure Standard).

Background

Current USDA-AMS regulations mandate BE food disclosure to be made on labels of food containing BE ingredients via one of four options: (1) a text statement, (2) an AMS-designed symbol, (3) an electronic or digital link, or (4) a text message. Food manufacturers may decide which of these four options they use.

Importantly, the Disclosure Standard only directed USDA-AMS to promulgate regulations mandating "text, symbol, or electronic or digital link" disclosure options. The law also directed USDA-AMS to "conduct a study to identify potential technological challenges that may impact whether consumers would have access to the bioengineering disclosure through electronic or digital disclosure methods" and to thereafter "provide additional and comparable options for such disclosure" if needed. Based on that study (conducted in 2017), the agency determined that a text message option qualified as a "comparable option" to help provide consumers adequate access to the disclosure.

But last fall, a federal district court invalidated the text message disclosure option. This ruling stemmed from a lawsuit filed by retail stores selling natural and organic food products and food safety advocacy organizations. That lawsuit alleged, among other things, that the text message disclosure option does not align with the express command of the Disclosure Standard to "provide additional and comparable options to access the bioengineering disclosure," and, as such, violated the Administrative Procedure Act. Indeed, the Disclosure Standard only expressly provided for text, symbol, or electronic or digital link disclosure options.

The court concluded that no aspect of the Disclosure Standard authorized USDA-AMS to expand the disclosure options for food manufacturers beyond the "text, symbol, or electronic or digital link" choices. The court therefore ordered the agency to reconsider the text message and electronic or digital link disclosure options and remanded the regulations, without vacating the current regulations (at 7 C.F.R. §§ 66.106 to 66.108), to USDA-AMS for further rulemaking. The court's decision to remand rather than vacate is (among other issues) currently on appeal at the U.S. Court of Appeals for the Ninth Circuit.

Request for Information

USDA-AMS requests stakeholder feedback on the following questions.

1. What are the current challenges associated with consumers accessing information on the BE status of foods by electronic or digital link disclosure in a retail setting?
2. If a regulated entity chooses to use an electronic or digital link to disclose a BE food, what additional and comparable option should AMS add to the electronic or digital link disclosure option that would be more helpful for consumers? In which location proximate to the electronic or digital link should an additional and comparable option be placed?
3. Provide information on current smartphone ownership among consumers, if available. For context, AMS is interested in the availability of wireless internet or cellular networks.
4. Provide information on the availability of broadband internet in a retail setting, if available. This could include broadband that is offered directly to consumers, or the accessibility to other private networks while in a retail setting.
5. Provide current information on the consumer usage of BE or other electronic or digital link disclosures in a retail setting. For context, AMS is trying to determine if accessibility to information through electronic and digital disclosure in retail settings is common. Responses can include use in restaurants or related retail sectors, in addition to grocery.
6. Explain any advantages and benefits to using the electronic or digital link disclosure option.
7. Provide any information available on the percentage of usage for each of the four current disclosure options. In addition, provide information on how many small businesses use each of the four disclosure options.
8. How long does it take on average to update label art, print new labels, and deploy new labels to production lines? How frequently are labels reordered and label inventory updated? Is there any standard cycle for updating retail product labels? How frequently is product inventory updated at retail? What is the preferred optimum compliance period for incorporating new mandatory disclosure information into products for retail?

USDA-AMS is currently accepting stakeholder comments until June 10, 2024. Interested parties such as food manufacturers availing themselves of the text message option should especially consider submitting comments on this topic directly to the agency, via industry trade associations, or both. Our food regulatory team is actively engaged in this issue and is happy to assist with drafting comments.

© 2024 Perkins Coie LLP

Authors

Explore more in

[Food & Beverage](#) [Food & Consumer Packaged Goods Litigation](#)

Related insights

Update

[California Court of Appeal Casts Doubt on Legality of Municipality's Voter ID Law](#)

Update

[February Tip of the Month: Federal Court Issues Nationwide Injunction Against Trump Executive Orders on DEI Initiatives](#)