

Food for Thought

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The debate over labeling of genetically modified organisms (GMOs) in foods has recently taken center stage in courts and legislative bodies across the country, with manufacturers and consumers alike striving to keep up with the rapidly evolving landscape.

The Ongoing Battle over GMO Labeling

The labeling of food products to indicate whether they contain genetically modified organisms (GMOs) has become a hot-button issue before legislative bodies and courts across the country.

On the legislative front, the issue has focused primarily on whether there should be a legal requirement for food products containing GMOs to be labeled expressly as such. Although a majority of states have proposed laws that would require food companies to disclose the presence of GMOs in their product labeling, very few of these have actually passed, and only Vermont's law has a set effective date. However, it is unclear whether even that law will reach its effective date of July 2016 intact: several food industry groups' challenge to the Vermont law is pending in the Second Circuit Court of Appeals. In addition, federal food-labeling legislation, if passed, could potentially expressly preempt state GMO-labeling laws like Vermont's.

The question of whether foods containing GMOs can be labeled as "natural" is one of the most commonly litigated issues relating to GMO labeling. Among consumer

class action claims related to food labeling, the allegation that a food is deceptively labeled as "natural" has become increasingly common, as has plaintiffs' assertion that the presence of GMOs in those foods is what renders the "natural" labeling misleading. Some courts have even certified this question to the U.S. Food and Drug Administration (FDA). Although the FDA has so far declined to resolve the issue, it recently solicited public comments on the term "natural" in food labeling, expressly citing questions about whether or not foods containing GMOs can be labeled as "natural" as one of the bases for issuing the request for comments.

This article provides an overview of recent litigation and legislative action on GMO labeling in food products, including the rules, regulations, and statutes involved, as well as an update on proposed legislation at the state and federal level.



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Background on GMOs

In 1994, with FDA approval, the “Flavr Savr tomato” hit the shelves as the first genetically engineered crop to be commercialized. G. Bruening & J.M. Lyons, *The Case of the Flavr Savr Tomato*, 54 Cal. Agric. 6 (July-Aug. 2000). Although the Flavr Savr tomato failed commercially, the product paved the way for other biotech companies to develop products containing GMOs. As a result, foods derived from GMOs have been in our food supply for approximately 20 years. Most recently, on November 19, 2015, the FDA issued its first approval for a genetically engineered animal intended for food—AquAdvantage Salmon. See Press Release, Food and Drug Admin., FDA Takes Several Actions Involving Genetically Engineered Plants and Animals for Food (Nov. 19, 2015).

But what exactly qualifies as a GMO? Genetic engineering is a breeding technique in which particular traits are introduced or reinforced at the molecular level. *FDA’s Role in Regulating Safety of GE Foods*, FDA (May 14, 2013).

A plant may be genetically modified to produce characteristics that enhance the nutritional value of food crops or to improve resistances that allow farmers to use fewer pesticides. One notable example of a genetically modified food is Hawaii’s Rainbow Papaya. In the mid-1990s, an outbreak of a ringspot virus ravaged Hawaii’s papaya crops, withering trees and blemishing the fruit with ring-shaped spots. With the Hawaiian papaya industry on the verge of extinction, scientists transferred certain genes from the ringspot virus into the papaya genome, eliciting a sort of “immune response” from the plant. Genetic modification saved Hawaii’s papayas by creating a virus-resistant variety of the plant—dubbed the “Rainbow Papaya”—which Hawaiian farmers continue to grow today. Tom Callis, *Papaya: A GMO success story*, Hawaii Tribune-Herald, June 10, 2013.

In addition to papayas, many of the foods we consume—including soybeans and corn—are genetically altered. With the prolific use of genetic engineering in food production by the United States (and by other countries with a large agricultural sector, such as Brazil and Argentina), GMOs have come to appear in a number of our food products.

In spite of—or perhaps because of—the prevalence of bioengineering in crop production, the use and labeling of GMOs in foods is hotly debated. Proponents advocate that bioengineering reduces the use of pesticides, yields more nutritious foods in greater quantities, and is a necessary tool in combatting world hunger. See Amy Maxmen, *GMOs May Feed the World Using Fewer Pesticides*, PBS Nova Next (July 24, 2013). Moreover, some wonder why modern genetic modification techniques should be viewed differently from traditional plant breeding methods. As pithily stated by famed astrophysicist Neil deGrasse Tyson: “Practically every food you buy in a store for consumption by humans is genetically modified food.... We have systematically genetically modified all the foods, the vegetables and animals that we have eaten ever since we cultivated them. It’s called artificial selection.” Chris Mooney, *Neil deGrasse Tyson Tells GMO Critics to “Chill Out,”* Mother Jones (July 30, 2014, 3:20 PM). Indeed, because farmers have been altering plants for thousands of years through breeding and selection, the FDA acknowledges that modern genetic modification techniques fall on the same continuum as traditional breeding methods. See 57 Fed. Reg. 22,984, 22,985–86 (proposed May 29, 1992). As such, the FDA has distinguished genetic engineering narrowly as an “extension[] at the molecular level of traditional [plant breeding] methods.” *Id.* at 22,991.

Despite the growing consensus that genetically modified foods are safe, GMO critics point to purported uncertainty about the long-term health, environmental, agricultural, and ecological consequences of bioengineering. See Megan Westgate, *The Power of Labeling: Preserving & Building a Non-GMO Food Supply*, HuffPost Green Blog (posted Oct. 15, 2013, 4:13 PM, updated Jan. 23, 2014, 6:58 PM). In addition, many GMO oppositionists call for “labeling transparency,” and the “right to know” what is in their foods. See, e.g., *Our Mission, Right to Know GMO*. Even among the pro-GMO-labeling contingency, some concede that GMOs are not necessarily “bad” for consumers’ health and that the pro-labeling stance is not necessarily grounded in science. See, e.g., Olga Khazan, *Ben & Jerry’s Is Fighting GMOs, for Some Reason*, The Atlantic (June 19, 2014, 2:30 PM).

The Federal Regulatory Backdrop

Several prominent federal laws and the implementing regulations govern food labeling and advertising.

Federal Food Labeling Laws

Foremost in the food labeling and advertising arena is the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), which

Federal food-labeling legislation, if passed, could potentially expressly preempt state GMO-labeling laws.

prohibits the sale or distribution of misbranded foods. 21 U.S.C. §393 *et seq.* The FDCA authorizes the FDA to regulate food safety and labeling. *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 331 (3d Cir. 2009). Specifically, the FDA has the power to “promulgate food definitions and standards of food quality.” *Id.* (internal quotation marks omitted). See, e.g., 21 C.F.R. pts. 100–199. While the FDCA does not provide a private right of action, the FDA may bring an enforcement action based upon misbranded foods. See 21 U.S.C. §337(a).

With regard to product labels, §343(a)(1) of the FDCA states that a food is misbranded if “its labeling is false or misleading in any particular.” *Id.* §343(a)(1). The term “misbranded” under the FDCA at least arguably operates as the functional equivalent of “deceptive” under state laws, but because there is no private right of action under the FDCA, litigants’ claims may be dismissed if they would require courts to make decisions related to FDA regulations promulgated under the FDCA.

The Nutrition Labeling and Education Act (NLEA) is codified as part of the FDCA and specifically addresses certain food- and beverage-labeling requirements, including requirements to identify artificial flavors on product labels, §343(k), and to identify “imitation” products or ingredients, §343(c). Moreover, NLEA required the FDA to set comprehensive standards for nutrition claims such as “low fat,” “light,”

and “healthy.” See, e.g., 21 C.F.R. §101.14. The FDA declined to establish a definition for the term “natural” under NLEA. See 56 Fed. Reg. 60,421-01, 60,463 (proposed Nov. 27, 1991).

Federal Regulation of Organic Products

The federal “organic” labeling requirements specifically address the use of GMOs in or-

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ganic products. The Organic Foods Production Act of 1990 (OFPA) establishes national standards for the sale and labeling of organically produced agricultural products, and it creates a certification program through which agricultural producers and products may become certified as “organic.” The United States Department of Agriculture (USDA) has promulgated regulations, known as the National Organic Program (NOP), 7 C.F.R. pt. 205, defining which agricultural products qualify as organic.

The use of GMOs is expressly prohibited in organic products. 7 C.F.R. §205.105(e) (2014) (restricting the use of the “100 percent organic,” “organic” and “made with organic (specified ingredients or food group(s))” label to foods produced without “[e]xcluded methods,” which are defined in §205.2 as “a variety of methods used to genetically modify organisms or influence their growth and development by means that are not possible under natural

conditions... includ[ing]... recombinant DNA technology.”).

It bears mentioning that the USDA does permit a small percentage of ingredients in “organic” products to be nonorganic. Indeed, the USDA has established a defined list of “nonsynthetic” and “synthetic” substances that may be used as ingredients in or on processed products labeled as “organic” or “made with organic (specified ingredients or food group(s)).” *Id.* §205.605. Among the synthetics allowed are activated charcoal, octadecylamine, silicon dioxide, and sodium acid pyrophosphate. See *id.* §205.605(b). Therefore, while a consumer can purchase an organic product and know that it does not contain GMOs, an organic product does not necessarily have to be “all-natural.”

The FDA Stance on “Natural”

To date, the FDA has not promulgated a formal rule explaining if or when any food may be labeled “natural.” The closest that the FDA has come to any position regarding “natural” is a 1993 notice in the Federal Register that states the use of the term “natural” on a food label is not misleading when “nothing artificial or synthetic... has been included in, or has been added to, a food that would not normally be expected to be in the food.” See 58 Fed. Reg. 2302, 2407 (Jan. 6, 1993).

Warning letters have also shed some light on what the FDA has considered “natural.” For example, in November 2011, the FDA issued a warning letter to Alexia Foods concerning an “all natural” claim on its “Roasted Red Potatoes & Baby Portabella Mushrooms” product, which contained the “synthetic chemical preservative” disodium dihydrogen pyrophosphate. FDA Warning Letter to Alexia Foods, Inc. (Nov. 16, 2011). The synthetic chemical preservative was an additive that the FDA said “would not normally be expected to be in the food.” *Id.* (quoting 58 Fed. Reg. 2407).

However, on November 10, 2015, the FDA announced that it would be soliciting public comments on the use of the term “natural” in food labeling. See “*Natural* on Food Labeling” (Dec. 24, 2015 Update). GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm456090.htm. The comment period opened on November 12, 2015, and while it was initially expected to close on February 10, 2016, the FDA recently extended the comment period to May

10, 2016 “in response to requests for an extension to allow interested persons additional time to submit comments.” See Use of the Term “Natural” in the Labeling of Human Food Products; Extension of Comment Period, 80 Fed. Reg. 80,718 (Dec. 28, 2015) (to be codified at 21 C.F.R. pt. 101). The FDA is specifically seeking comments on whether or not it should define the term “natural,” and if so, how the term should be defined. See Use of the Term “Natural” in the Labeling of Human Food Products; Request for Information and Comments, 80 Fed. Reg. 69,905 (Nov. 12, 2015) (to be codified at 21 C.F.R. pt. 101).

The FDA is also seeking comments regarding how it should determine the appropriate use of “natural” in food labels, e.g., whether it should consider manufacturing processes and whether the term should apply only to “unprocessed” foods. *Id.* at 69,908. The FDA stated that its decision to request comments is partly in response to three Citizen Petitions seeking clarification on the term “natural,” including one by the Grocery Manufacturers Association (GMA) requesting that the FDA “issue a regulation authorizing statements such as ‘natural’ on foods that are or contain foods derived from biotechnology,” and one asking the FDA to prohibit the use of “natural” in food labels altogether. *Id.* at 69,906–07. The FDA also explained that private litigation surrounding the term “natural” has led some federal courts to seek administrative determinations from the FDA on whether or not food products containing genetically engineered ingredients or high fructose corn syrup may be labeled as “natural.” *Id.* at 69,907. In announcing its request for public comment, the FDA acknowledged that it has not previously issued a rule formally defining the term “natural,” but it did refer to its “long-standing policy” that the term “natural” means that “nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in that food.” *Id.* at 69,906. It remains to be seen whether or not the FDA will take action after the current comment period.

FDA Regulation of GMO Labeling

In 1992, the FDA announced that it would regulate bioengineered foods under its ex-

isting regulatory framework, “utilizing an approach identical in principle to that applied to foods developed by traditional plant breeding.” 57 Fed. Reg. 22,984-01, 22,984 (May 29, 1992). For the most part, the FDA concluded that bioengineered food need not be labeled differently from non-bioengineered food. *See id.* at 22,991. According to the FDA’s statement of policy, genetic-modification labeling would be required only in the rare instance that the altered food product differs so dramatically from its traditional counterpart that the “common or usual name” no longer applies, or if a “safety or usage issue exists to which consumers must be alerted.” *Id.* In 1993, after issuing a public request for information on genetically engineered-food labeling, the FDA reiterated its stance that bioengineering need not be specially disclosed. 58 Fed. Reg. 25,837–03, 25,839 (April 28, 1993). The agency reaffirmed this position in 2001 and again in 2005. *See* Statement of Robert E. Brackett, Director, Center for Food Safety and Applied Nutrition, FDA (June 14, 2005). More recently, on November 19, 2015, the FDA denied two Citizen Petitions, filed by the Truth in Labeling Coalition in 2010 and the Center for Food Safety (CFS) in 2011, respectively, that urged the FDA to require labels on GMO food. *See* U.S. Dep’t of Health and Human Servs., Citizen Petition Denial Response from FDA to Ctr. for Food Safety, Docket No. FDA-2011-P-0725 (Nov. 19, 2015); U.S. Dep’t of Health and Human Servs., Citizen Petition Denial Response from FDA to Truth in Labeling Coal., Docket No. FDA-2010-P-0081 (Nov. 19, 2015). Industry associations, including the GMA, hailed the FDA’s decision. *See* Press Release, GMA Applauds FDA Denial of Petition for Mandatory GMO Labeling (Nov. 19, 2015).

In sum, the FDA has steadfastly maintained that for the purposes of food labeling, there is no material difference between crops grown from bioengineered seeds and crops grown using traditionally bred seeds. Consequently, the FDA does not currently require that foods containing GMOs be labeled as such.

However, since various food manufacturers have begun *voluntarily* to provide “non-GMO” statements in their product labeling, the FDA recently published a final guidance to assist manufacturers that

wish to state voluntarily on their product labeling whether or not the food has been derived from GMO plants. *See* U.S. Food and Drug Admin., FDA-2000-D-0075, Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Derived from Genetically Engineered Plants (2015). In this final guidance, the FDA stated that its “main concern within the context of [the] guidance is that such voluntary labeling be truthful and not misleading.” *Id.* The FDA expressed a preference for phrases such as “not bioengineered” or “not genetically modified through the use of modern biotechnology” over “non-GMO” or “GMO free,” to remove the possibility for misleading labeling. *Id.*

On the same day, and together with its approval of AquAdvantage Salmon (the first genetically engineered animal intended for food), the FDA also issued a draft guidance pertaining to labeling of foods derived from this genetically engineered salmon. *See* U.S. Food and Drug Admin., FDA-2015-D-4272, Draft Guidance for Industry: Voluntary Labeling Indicating Whether Food Has or Has Not Been Derived from Genetically Engineered Atlantic Salmon (2015). The draft guidance does not require that the salmon, or foods derived from it, be labeled as containing GMOs. *See id.* §II.

After the FDA’s announcement of the approval and the draft guidance, the Center for Food Safety (CFS) announced that it planned to file a lawsuit targeting, among other things, the FDA’s decision not to require labeling disclosing the salmon as genetically engineered. *See* Press Release, Ctr. for Food Safety, FDA Approves First Genetically Engineered Animal for Human Consumption Over the Objection of Millions (Nov. 19, 2015).

However, consumers will not be seeing AquAdvantage Salmon on their grocery store shelves any time soon. In January 2016, the FDA banned the import into the United States of any food containing the GMO salmon until the FDA establishes labeling standards. This ban was prompted by a Congressional directive. *See* FDA Import Alert 99-40 (Jan. 29, 2016).

Proposed Federal Legislation on Food Labeling

Recently, legislators in the U.S. House of Representatives and Senate have been busy

proposing various bills concerning GMO labeling. The Genetically Engineered Food Right-to-Know Act—originally introduced in 2013 and subsequently reintroduced in February 2015—would amend the FDCA to require a food containing GMOs to reflect so in its labeling or risk being considered “misbranded.” *See* H.R. 913, 114th Cong. (as proposed Feb. 12, 2015); S. 511, 114th

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Cong. (as proposed Feb. 12, 2015). The act also would prohibit the term “natural” in labeling of GMO-containing foods. *See* H.R. 913; S. 511.

The Food Labeling Modernization Act (FLMA) of 2015 (an updated version of legislation by the same name introduced in the House in 2013) also would amend the FDCA to clarify when a food labeled “natural” is misbranded. *See* H.R. 4061, 114th Cong. (as proposed Nov. 18, 2015); S. 2301, 114th Cong. (as proposed Nov. 18, 2015). The FLMA directs the Secretary of Health and Human Services to promulgate a rule defining the term “natural” in a manner “to exclude, at a minimum, the use of any artificial food or ingredient (including any artificial flavor or added color) or any synthetic substance” and “based on data, including data on consumers’ understanding of the term as used in connection with food.” H.R. 4061 §4; S. 2301 §4. Corn syrup, high-fructose corn syrup, and cocoa processed with alkali are among the ingredients that the act defines as “artificial.” H.R. 4061 §11; S. 2301 §11. The act also calls for the Secretary of Health and Human Services to “conduct consumer surveys and studies and issue a timely call for relevant public submissions regarding relevant consumer research, including with respect to consumer understanding of the term ‘natural’ in relation to the term ‘organic’” and to “fully consider the results of such surveys and studies, as well as such public submissions.” H.R. 4061 §4; S. 2301 §4. Notably, the act does not mention genetically modified foods specifically, but the



public input likely would address the issue. Thus, it remains unclear what effect this proposed law would have on labeling for products containing GMOs.

On July 23, 2015, the House of Representatives passed the Safe and Accurate Food Labeling Act (SAFLA), but, on March 16, 2016, the bill did not receive enough Senate votes to pass, with 48 senators voting for it



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and 49 voting against it. SAFLA would have established a federal system of *voluntary* labeling of GMOs in foods, as well as mandatory review by the FDA to determine the safety of individual GMOs before they are brought to market. Safe and Accurate Food Labeling Act, H.R. 1599, 114th Cong. (as passed by H.R., July 23, 2015). Furthermore, the act would have required the FDA to enact regulations regarding the term “natural” in labeling for GMO foods within 30 months after enactment of the law. *Id.* SAFLA would also have expressly precluded states from requiring mandatory GMO labeling and from banning GMO crops. *Id.* In response to the Senate’s rejection of SAFLA, Pamela Bailey, president and CEO of GMA, said that GMA is committed to working with senators to come up with a bipartisan solution. See Stephanie Strom, *Bill to Stop States Requiring Labeling of GMO Foods Fails*, N.Y. Times (Mar. 16, 2016).

Another bill that would establish a federal labeling standard was recently introduced in the Senate. The Biotechnology

Food Labeling Uniformity Act, introduced by Senator Jeff Merkley (D-Or.) on March 2, 2016, describes four different ways that food manufacturers can disclose the presence of GMOs in their food products. S. 2621, 114th Cong. Manufacturers would have the option to (1) identify the specific ingredients that are genetically modified (either by stating “genetically engineered” or “GE” in parentheses after the ingredient(s) or identifying those ingredients with an asterisk and providing an explanation of the asterisk’s meaning below the ingredient list); (2) include an FDA-approved statement at the bottom of the ingredient list stating that the food product was produced with generic engineering or contains genetically engineered ingredients; or (3) include an FDA-approved GMO symbol on the package. See *id.* §2(a). In promoting his bill, Senator Merkley explained: “There is a way to give consumers the information they are asking for without placing unfair or conflicting requirements on food producers. This legislation provides the common-sense pathway forward.” See Press Release, Jeff Merkley, United States Senator for Oregon, Merkley, Leahy, Tester Feinstein Introduce GMO Food Labeling Legislation (March 2, 2016).

State Food Labeling Initiatives

In addition to the federal laws, regulations, and guidelines, state laws can also be implicated in consumer class actions relating to food labeling. California—where a majority of consumer class actions relating to food labeling are being filed—has a number of consumer protection laws that class plaintiffs frequently invoke, including the False Advertising Law (FAL), the Unfair Competition Law (UCL), and Consumer Legal Remedies Act (CLRA). Plaintiffs have similarly invoked analogous consumer protection statutes, such as the New Jersey Consumer Fraud Act (NJCFRA), in other states.

Moreover, a number of states have proposed legislation requiring, to varying degrees, disclosure of GMOs. Over the past few years, a series of “right to know” bills have been proposed in at least 30 states: Alaska, Arizona, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nevada, New

Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, West Virginia, and Wyoming. Some of these bills would also preclude GMOs from being labeled as “natural.”

To date, GMO-labeling laws have been passed in Vermont, Connecticut, Maine, and Alaska, although Alaska’s law narrowly pertains to genetically engineered salmon, only.

Vermont GMO Labeling Law

In May 2014, Vermont became the first state to require mandatory labels on genetically modified food. See H.112, 2013-2014 Leg., Reg. Sess. (Vt. 2014). The Vermont law requires that by July 2016, retail food products produced entirely or partially from GMOs must be labeled as such if they are sold for human consumption in Vermont. *Id.* The law also prohibits manufacturers from using the terms “natural,” “all natural,” or other similar terms on the labeling for food products containing GMOs. *Id.* Notably, products derived from animals that were fed genetically engineered food are exempt from the labeling rules. *Id.* Vermont’s attorney general adopted the law in April 2015. See Public Prot. Div., Vt. Office of the Attorney Gen., Consumer Protection—Labeling Foods Produced with Genetic Engineering, Consumer Prot. R. 121, adopted pursuant to 2013, No. 120, (Adj. Sess.) §3 (effective July 1, 2016), (Consumer Prot. R. 121).

Connecticut and Maine Labeling Laws

Connecticut’s labeling law, which was the first of its kind to be passed, will not go into effect unless Rhode Island, Massachusetts, or New York also passes a GMO-labeling law, and legislation is pending in each of these states. The Connecticut law would specifically require that genetically modified food be labeled as such (“Produced with Genetic Engineering”), and it would preclude foods that have been genetically engineered from being labeled as “natural.” See H.B. 6519, Gen. Assemb., Jan. Sess. (Conn. 2013).

Similar to Connecticut’s law, Maine’s law has a contingent effective date—one that hinges upon the passage of similar legislation in at least “[five] other states or in a state or states with a population or com-

bined population of at least 20,000,000.” See H.P. 490, 126th Leg., 1st Reg. Sess. (Me. 2013). Vermont’s population is approximately 626,042. *State & County QuickFacts: Vermont, Population*, U.S. Census Bureau (July 1, 2015). Maine’s bill also requires a “Produced with Genetic Engineering” label and prohibits “natural” labeling on such foods. See Me. H.P. 490.

Unsuccessful Proposed Legislation and Ballot Initiatives

Proposed GMO disclosure bills have been opposed and have ultimately failed in a number of states—including California, Colorado, Hawaii, Washington, New Mexico, and New Hampshire. Moreover, in the summer of 2012, the American Medical Association (AMA) issued a statement opposing GMO labeling. See AMA, *H-480.958 Bioengineered (Genetically Engineered) Crops and Foods*. Among other things, the AMA cited “no scientific justification for special labeling of bioengineered foods” as a reason for opposing the GMO-labeling ballot initiative. *Id.* The AMA supported its position under the FDA’s longstanding, science-based approach that finds no evidence of material differences between bioengineered foods and their traditional counterparts. The AMA statement admonished even voluntary labeling as “without value unless... accompanied by focused consumer education.” *Id.*

To date, no state GMO-labeling law has been enacted via ballot initiative; ballot initiatives have thus far failed in states such as California, Washington, Colorado, and Oregon. In November 2014, voters in Colorado and Oregon considered and rejected GMO-labeling measures. Colorado’s Proposition 105 would have required by January 1, 2016, packaged or raw foods made with GMOs and sold in retail outlets to be labeled with the phrase “Produced with Genetic Engineering,” with exemptions for processed food intended for immediate human consumption (such as those sold at restaurants and delis). See Colorado Right to Know Act, 2013-14 #48 (Co. 2014). Likewise, Oregon’s Measure 92 would have required packaged foods containing “some products of genetic engineering,” be labeled by manufacturers as “Produced with Genetic Engineering,” or “Partially Produced with Genetic Engi-

neering.” However, Oregon’s Measure 92 would have gone much further than Colorado’s by requiring on some occasions that retailers place a sign next to genetically modified produce indicating that the commodity has been modified. Oregon Mandatory Labeling of GMOs Initiative, Measure 92 (2014), Ballotpedia.

Even in certain states where GMO disclosure ballot initiatives previously failed, the GMO-labeling debate has persisted. For example, although California’s GMO-labeling ballot initiative, Proposition 37, was rejected by voters in 2012, a state lawmaker introduced new GMO-disclosure legislation in February 2014. See S.B. 1381, 2014 Leg., Reg. Sess. (Cal. 2014). Though bearing similarities to Prop 37, the renewed attempt had some important modifications. First, S.B. 1381 would not have prohibited GMOs from being labeled as “natural.” *Id.* Second, while authorizing consumers to sue companies if they did not label their GMO-containing food products as such, S.B. 1381 (unlike Prop 37) would have prevented consumer plaintiffs from collecting damages and it limited their monetary awards to attorneys’ fees and costs. *Id.* Third, S.B. 1381 would have limited liability of farmers and retailers, putting the onus upon manufacturers and producers to provide package labeling. *Id.* However, these modifications were not enough to achieve a different result for S.B. 1381, which failed in the California Senate in May 2014. See *Votes, S.B. 1381 Food Labeling: Genetically Engineered Food*, California Legislative Information.

State Legislative Battles Continue

Despite such failures and dissension, state legislators continue to push for disclosure of GMOs, and in addition to the law passed in Vermont, some other labeling bills have recently gained legislative traction. For instance, in January 2013, a GMO-labeling bill was introduced to the New York state assembly panel; the bill, A-3525, received a public hearing on July 30, 2013, and sent to the state assembly’s committee on codes to be voted on by June 2014. See A-3525, 2013-2014 Leg., Reg. Sess. (N.Y. 2013). However, A-3525 died in committee. See A-3525, 2013-2014 Leg., Reg. Sess. (N.Y. 2013).

Several other GMO-labeling bills have since been introduced in the New York leg-

islature, including one on June 4, 2015, a bill that would require foods that *do not* contain GMOs to be labeled “GMO free.” See Assemb. B. 8017, 2015-2016 Leg., Reg. Sess. (N.Y. 2015). Meanwhile, in New Jersey, GMO-labeling bills, S.B. 238 and S.B. 1470, are pending in the legislature. See S.B. 1470, 217th Leg., 2016-2017 Reg. Sess. (N.J. 2016); S.B. 238, 217th Leg., 2016-2017 Reg. Sess. (N.J. 2016). Furthermore, in early 2015, a pair of GMO-labeling bills was introduced to the Rhode Island Senate, but it has since stalled. See S.B. 549, 2015 Leg., Reg. Sess. (R.I. 2015); S.B. 557, 2015 Leg., Reg. Sess. (R.I. 2015).

The legislative battle on GMO labeling is far from over. To date, over 70 bills addressing labeling have been introduced in more than 30 states. *State Labeling Initiatives*, Center for Food Safety. The passage of a labeling bill in a large state such as New York or California could trigger additional legislation. Indeed, the passage of New York’s GMO-labeling legislation alone would trigger both Maine’s and Connecticut’s laws to take effect.

As the labeling landscape continues to develop state by state, it remains important for food industry members to keep up with the laws of the states in which they place their products.

Questions About GMO-Labeling Laws

National consensus has not developed about where authority to require, or not to require, GMO labeling should reside. Some have advocated for authority to rest with the states; others have advocated for a federal standard to ensure uniformity across the country. Industry groups have advocated for voluntary federal standards. And some states—even some with pending legislation—appear reluctant to blaze a trail.

Where Should Authority Reside?

As the legislative patchwork develops at the state level, one important question that remains is whether the country should take a state-by-state approach to GMO labeling. On the one hand, some have advocated for state-specific determinations on the issues involved. However, in 2013, the United States Senate rejected a proposed amendment to the Farm Bill that would have expressly permitted states to decide whether to require GMO labeling. See S. Amdt. 965, 113th Cong. (as rejected by



Senate, May 23, 2013). The bill's proponent, Senator Bernie Sanders (I-VT) proposed the amendment in an attempt to clarify that states have the authority to require such labels (as states continue to pass or consider such legislation). See Press Release, Bernie Sanders, United States Senator for Vermont, Sanders: Let States Require GMO Food Labels (May 22, 2013).



In addition to the federal laws, regulations, and guidelines, state laws can also be implicated in consumer class actions relating to food labeling.

However, the Senate voted overwhelmingly against the proposed legislation, 71 to 27. See S. Amdt. 965.

Indeed, others have expressly eschewed the state-by-state approach, pushing for a federal standard to ensure uniformity. As discussed previously, SAFLA (the Safe and Affordable Food Labeling Act) would have expressly precluded the states from requiring mandatory GMO labeling or banning GMO crops. See H.R. 1599. Opponents criticized the bill for depriving consumers of the right to know what is in their food products and for taking the issues related to GMO and "natural" labeling out of the states' hands. Indeed, opponents pejoratively nicknamed the bill the "DARK Act" ("Deny Americans the Right to Know"). Also, in December 2014, several chefs—including Tom Colicchio of "Top Chef" fame—presented to Congress a petition signed by over 700 chefs opposing SAFLA and urging passage of the Genetically Engineered Right-to-Know Act. See Tennille Tracy, *Chefs Push Lawmakers on Labeling Genetically Modified Food*, Wall St. J. (Dec. 1, 2014). Notably, the Genetically Engineered Right-to-Know Act would exempt restaurants from GMO-labeling requirements. See H.R. 913 §3(a); S. 511 §3(a).

A coalition of food industry groups has advocated for voluntary federal standards for the labeling of foods containing GMOs. The GMA, along with 28 other groups, supports a federal framework for GMO labeling. According to the GMA president and CEO, "Our nation's food safety and labeling laws should not be set by political campaigns or state and local legislatures, but by the FDA, the nation's foremost food safety agency." See Press Release, GMA, *Legislation Needed to Protect Consumers by Eliminating Confusion and Advancing Food Safety* (Feb. 6, 2014). The groups also support an FDA-created definition of "natural" in relation to food and beverages. *Id.*

Legal Challenges to State GMO-Labeling Laws

Concern about challenges to GMO-labeling laws might be one reason that states such as Connecticut and Maine have been hesitant to be frontrunners in requiring such labeling. Indeed, a month after the Vermont bill was signed into law, certain food industry groups filed a federal lawsuit challenging Vermont's GMO-labeling law, arguing that it interferes with their free speech, regulates interstate commerce, and is preempted by federal law. See Compl. for Declaratory and Injunctive Relief, *Grocery Mfg. Assoc. v. Sorrell*, No. 5:14-CV-117 (D. Vt. June 12, 2014) (Dkt. 1). Vermont apparently anticipated litigation against Act 120, since the law itself created a "Genetically Engineered Food Labeling Special Fund," to cover costs incurred by the state or its attorney general in implementing and administering the new law, including costs of litigation regarding the law's requirements. See H.112, 2013-2014 Leg., Reg. Sess. (Vt. 2014).

On April 27, 2015, the U.S. District Court for the District of Vermont denied the plaintiffs' motion for a preliminary injunction before the law takes effect on July 1, 2016, and in response to a motion to dismiss filed by Vermont, the court held that the food industry group plaintiffs did not plausibly allege the unconstitutionality of the law based on First Amendment or due process grounds. See Op. and Order Granting in Part and Den. in Part Defs.' Mot. to Dismiss and Denying Pls.' Mot. for Prelim. Inj., *Grocery Mfrs. Ass'n. v. Sorrell*, No. 5:14-cv-117 (D. Vt. Apr. 27, 2015) (Dkt. 95). Judge Christina Reiss held that the Vermont law

is reasonably related to the substantial state interest in "the need to disclose information relevant to potential health consequences from human consumption of GE foods; to accommodate religious beliefs and practices regarding GE and GE food; to promote informed consumer decision-making; and to address the potential 'unintended' consequences from GE food production to non-GE crops and the environment." *Id.* at 63. Judge Reiss also dismissed the preemption claims and some of the Commerce Clause claims. *Id.* at 18-43.

The GMA and other food industry groups have continued to fight the Vermont law by appealing the district court's decision to the Second Circuit. The appeal again seeks a preliminary injunction, with a focus on the plaintiffs' First Amendment arguments, maintaining that the labeling mandate in Vermont's Act 120 violates food companies' First Amendment right to refrain from speaking, and further, it violates the First Amendment with its ban on using the term "natural" in labels of GMO foods. See Br. for Pls.-Appellants, *Grocery Mfrs. Ass'n. v. Sorrell*, No. 15-1504 (2d Cir. June 24, 2015) (Dkt. 31). The appellants argue that the district court applied the wrong level of scrutiny to their First Amendment claims and that the court should have applied a heightened standard, which was articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), because the Vermont labeling law cannot be considered "uncontroversial." Br. for Pls.-Appellants, *Grocery Mfrs. Ass'n. v. Sorrell*, No. 15-1504, at 25-36. Moreover, the appellants argue that Act 120 is unconstitutional even under the more relaxed reasonable-relationship test applied by the district court because the labeling mandate does not serve a substantial state interest, and the law itself is unreasonable. *Id.* at 46-50. The appellants also argue that there must be a preliminary injunction, at least upon the ban upon the term "natural" in labels for food containing GMOs, since the district court found that this ban likely violates the First Amendment. *Id.* at 50-59. The appellants argue that such a violation causes irreparable harm. *Id.* Oral argument took place before the Second Circuit in October 2015. See *Sorrell*, No. 15-1504 (2d Cir. Oct.

8, 2015) (Dkt. 152). The Second Circuit's much-awaited ruling is pending.

Interest in the appeal is high, as exhibited by the slew of amicus briefs filed with the Second Circuit, both opposing and supporting the Vermont law. Those asking for reversal of Judge Reiss's ruling include the Chamber of Commerce, the American Soybean Association, and the National Corn Growers Association. See Br. for Amicus Curiae Chamber of Commerce of the U.S. of Am. in Support of the Pls.-Appellants, *Sorrell*, No. 15-1504 (2d Cir. July 1, 2015) (Dkt. 88); Br. of Amici Curiae Agricultural and Commodity Trade Ass'ns. in Support of the Pls.-Appellants' Mot. for a Prelim. Inj., *Sorrell*, No. 15-1504 (2d Cir. July 1, 2015) (Dkt. 79). Those in support of the Vermont labeling mandate include public interest groups such as the CFS, as well as several states' attorneys general (including those of Connecticut and Maine). See Br. of Amicus Curiae Dr. Ramon J. Seidler, *et al.* in Support of Defs.-Appellees and Affirmance of the Dist. Ct., *Sorrell*, No. 15-1504 (2d Cir. Aug. 31, 2015) (Dkt. 114); Br. of Amicus Curiae States of Conn., Me., Md., Mass., Ha., Ill., N.H., and Wash. in Support of Defs.-Appellees and Affirmance, *Sorrell*, No. 15-1504 (2d Cir. Aug. 31, 2015) (Dkt. 104).

While the litigation is pending, the Vermont Office of Attorney General has continued with its planned implementation of Act 120; in October 2014, it released a draft of the proposed rules enforcing the labeling law, and it invited public comment at informal hearings held at the end of October. See Press Release, Vt. Office of the Attorney Gen. William H. Sorrell, Attorney General Releases Draft GE Food Labeling Rule for Public Input (Oct. 15, 2014). Subsequently, in April 2015, the Vermont Attorney General formally adopted Consumer Protection Rule CP 121, which implements Act 120. See Consumer Prot. R. 121 (Vt.). On September 23, 2015, the Attorney General's office issued a guidance document, in the form of an annotated version of the rule, explaining how the rule will be implemented. See Public Prot. Div., Vt. Office of the Attorney Gen., Consumer Protection—Labeling Foods Produced with Genetic Engineering, Annotated Consumer Prot. R. 121, adopted pursuant to 2013, No. 120, (Adj. Sess.) §3 (effective July 1, 2016).

Beyond its legal challenge to Vermont's law, the GMA also wrote to the governor of Vermont on June 17, 2015, outlining and seeking guidance on the financial challenges associated with Vermont's new labeling law—including food companies changing their labels and incurring potential liability for supply chain errors. Letter from Pamela G. Bailey, Grocery Mfrs. Ass'n, to Governor Peter Shumlin, Governor of Vt. (Jun. 17, 2015).

Voluntary Labeling Requirements

Some food companies have taken it upon themselves to provide information to consumers regarding the presence of GMOs in food products. On December 2, 2015, the GMA announced that numerous major food and beverage companies—including ConAgra, Nestle, and Coca-Cola—would launch online labeling disclosing a host of information about their products. See Press Release, Grocery Mfrs. Ass'n, New SmartLabel™ Initiative Gives Consumers Easy Access to Detailed Product Ingredient Information (Dec. 2, 2015). Using this new "SmartLabel" system, consumers will be able to scan a bar code or search a product online (through a search engine, a company's website, or eventually an app) to learn a host of information about food, beverage, personal care, household, and pet products. *Id.* According to the GMA's press release, food and beverage companies project that by the end of 2017, their SmartLabels will disclose, *inter alia*, whether their products contain GMOs. *Id.* The press release also stresses that the "GMA and a wide range of agriculture and business groups are urging Congress to pass legislation setting a uniform national standard for GMO labeling to replace a patchwork of state labeling mandates that vary from state to state." *Id.*

Previously, in March 2013, Whole Foods Market announced that it would require its supplier partners to label products containing GMO ingredients—a plan that the grocery chain aims to accomplish by 2018. See Walter Robb and A.C. Gallo, *GMO Labeling Coming to Whole Foods Market*, Whole Story: The Official Whole Foods Market Blog (Mar. 8, 2013). The two methods for non-GMO verification will be through the government's organic-certification process or through the Non-GMO Project's independent verification program. See A.C.

Gallo, *Three Month Update on GMO Labeling*, Whole Story: The Official Whole Foods Market Blog (June 18, 2013).

The Non-GMO Project defines GMOs as "[a] plant, animal, microorganism, or other organism whose genetic makeup has been modified using recombinant DNA methods, also called gene splicing, gene modification, or transgenic technology..." See

The legislative battle

on GMO labeling is far from over. To date, over 70 bills addressing labeling have been introduced in more than 30 states.

GMO or Genetically Modified Organism Definition, Non-GMO Project Standard §1.3.4 (May 2014). However, neither Whole Foods's policy nor the Non-GMO Project's standard specifically addresses "natural" labeling. In July 2015, Whole Foods advised its consumers that, while it continues to work with its suppliers toward its 2018 goal, SAFLA "may seriously inhibit" its "ability to deliver on [its] commitment to GMO labeling transparency." See A.C. Gallo, *Need to Know: House Bill Could Affect GMO Labeling*, Whole Story: The Official Whole Foods Market Blog (July 22, 2015). However, Whole Foods does not explain how SAFLA—which would still permit voluntary labeling of GMOs—would inhibit its plan for GMO labeling. See *id.*

Litigation Involving "Natural" Labeling of Foods Containing GMOs

Initially, the majority of lawsuits challenging "all natural" claims involved products containing high-fructose corn syrup. See, e.g., *Wright v. Gen. Mills, Inc.*, Civ. No. 08cv1532 L(NLS), 2009 WL 3247148, at *1 (S.D. Cal. Sept. 30, 2009) (challenging Nature Valley chewy granola bars sold as "100 percent Natural" because they contained one or more ingredients that plaintiffs claimed to be non-natural, such as high fructose corn syrup). But over time,

consumer class action claims involving “natural” labeling have expanded in scope.

More recently, a number of lawsuits have emerged across the country challenging the use of “natural” labeling on food products containing GMOs. Generally, plaintiffs assert that a “natural” claim on the product’s label is deceptive because the product contains genetically modified ingredients, which, according to the plaintiffs, renders the food product unnatural. *See, e.g., Class Action Compl. at 1-5, Korn, et al. v. Snyder’s-Lance Inc.*, No. 3:15-cv-02593 (N.D. Cal. June 10, 2015) (Dkt. 1) (alleging that snack products labeled as “natural” were deceptively marketed and advertised because they contained genetically modified, artificial, and/or synthetic ingredients); *Second Am. Class Action Compl. at 3, 4, 8-17, Rojas v. Gen. Mills, Inc.*, No. 12-cv-05099-WHO, 2014 WL 1248017 (N.D. Cal. Mar. 26, 2014) (alleging as untrue and misleading General Mills’s representation that its Nature Valley granola bars were “100 percent Natural,” because the products contain GMOs and “GMOs are not ‘natural’ and certainly not ‘100 percent Natural’”); *Class Action Compl. at 6-8, Koehler v. Pepperidge Farm, Inc.*, No. 13-cv-02644-YGR, 2013 WL 4806895 (N.D. Cal. Sept. 9, 2013) (alleging that Goldfish Crackers cannot be natural because several of its ingredients—including soy, vitamin B1, vitamin B2, folic acid, and leavening—are derived from GMOs).

In their complaints, some plaintiffs rely on a subjective standard, claiming that labeling a product as “natural” when it contains GMOs runs contrary to the reasonable consumer’s expectation of the term. *See, e.g., Class Action Compl. at 5, Silber v. Barbara’s Bakery, Inc.*, 950 F. Supp. 2d 432, 435 (E.D.N.Y. 2013) (No. 12-cv-0551) (“Research shows that a majority of consumers expect “natural” foods to be free of genetically engineered ingredients, and many consumers consider the absence of [GMOs] to be important.”). Other plaintiffs go beyond simply pointing to the purported consumer understanding of the term “natural,” and instead point to what plaintiffs contend is the FDA’s “definition” of natural. Because, as described above, the FDA does not have an official definition of “natural,” plaintiffs’ complaints generally refer to some composite definition of “natural,” which they assemble from various informal FDA state-

ments and notices. *See Silber*, 950 F. Supp. 2d at 435 (discussing plaintiffs’ attempt to establish the FDA’s “definition” of “natural”). Thus, plaintiffs contend that neither the FDA’s purported “definition” nor plaintiffs’ purported common-sense understanding of “natural” contemplates bioengineering, and therefore, labeling a product as “natural” when it contains GMOs is a “false, misleading, and deceptive” statement. *Id.* at 438. *But see Astiana v. Kashi Co.*, 291 F.R.D. 493, 508 (S.D. Cal. 2013) (“Plaintiffs fail to sufficiently show that ‘All Natural’ has any kind of uniform definition among class members, that a sufficient portion of class members would have relied to their detriment on the representation, or that Defendant’s representation of ‘All Natural’ in light of the presence of the challenged ingredients would be considered to be a material falsehood by class members.”).

As of late 2015, more than 80 cases had been filed concerning the labeling of snacks, cereals, and other food products that contain GMOs. In alleging that foods containing GMOs are deceptively labeled as “natural,” plaintiffs have invoked various legal and normative considerations, which range from local laws, to company policies, to consumer trends.

Conclusion

A bioengineered crop can be grown from the soil just the same as its traditional counterpart, but the bioengineered crop gives rise to much “food for thought” for legislators, courts, legal counsel, the food industry, farmers, and consumers. Should a food company be required to disclose in labeling that its food contains GMOs? Should an individual state be permitted to mandate that disclosure? And can a food company state in labeling that the GMO food is “natural?”

Because these issues are being actively litigated in courts across the country, and because the legislative and the regulatory landscapes continue to evolve rapidly, food industry companies and their legal counsel are advised to keep up to date with emerging trends, changing legal standards, legislative movements, and the possibility of regulatory response.

