



## **Agricultural Marketing Service**

### **7 CFR Part 66**

**[Doc. No. AMS-FTPP-23-0019]**

## **National Bioengineered Food Disclosure Standard; Request for Information on Electronic and Digital Link Disclosures**

**AGENCY:** Agricultural Marketing Service (AMS); Department of Agriculture (USDA).

**ACTION:** Notice; request for information.

**SUMMARY:** The Agricultural Marketing Service of the USDA is soliciting information about potential amendments to the electronic or digital link disclosure option as it pertains to the National Bioengineered Food Disclosure Standard (Standard).

**DATES:** Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*] to be assured of consideration.

**ADDRESSES:** Interested parties are invited to submit written comments via the internet at <https://www.regulations.gov>. Enter “AMS-FTPP-23-0019” in the Search field. Select the Documents tab, then select the ‘Comment’ button in the list of documents.

Comments may also be filed by mail or by fax with the Docket Clerk, 1400 Independence Ave. SW, Room 2069 – South, Washington, DC 20250; Fax: (202) 260-8369. All comments submitted in response to this notice, including the identity of individuals or entities submitting comments, will be made available to the public on the internet via <https://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Kenneth Becker, Research and Rulemaking Branch Chief, Food Disclosure and Labeling Division, Fair Trade Practices Program, Agricultural Marketing Service, U.S. Department of Agriculture, Telephone (202) 570–3661, Email [kenneth.becker@usda.gov](mailto:kenneth.becker@usda.gov).

**SUPPLEMENTARY INFORMATION:**

## I. Background

On July 29, 2016, Public Law 114–216 amended the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et. seq.*) (amended Act) to require USDA to establish a national, mandatory standard for disclosing any food that is or may be bioengineered (BE). In accordance with the amended Act, USDA published final regulations to implement the Standard on December 21, 2018 (83 FR 65814). The regulations became effective on February 19, 2019, with a mandatory compliance date of January 1, 2022. Under 7 CFR 66.1, a bioengineered food is a food that— subject to certain factors, conditions, and limitations— contains detectable genetic material that has been modified through *in vitro* recombinant deoxyribonucleic acid (rDNA) techniques and for which the modification could not otherwise be obtained through conventional breeding or found in nature.

The amended Act requires USDA to implement the following three BE food disclosure options: on-package text; on-package symbol; and an electronic or digital link, with the disclosure option to be selected by the food manufacturer. 7 U.S.C. 1639b(b)(2)(D). The amended Act directs USDA to require food manufacturers selecting the electronic or digital link disclosure option to include a telephone number that provides access to the disclosure. 7 U.S.C. 1639b(d)(4). Additionally, the amended Act requires USDA to conduct a study to identify potential technological challenges that may impact whether consumers would have access to the BE food disclosure through electronic or digital disclosure methods prior to promulgating regulations establishing the Standard. 7 U.S.C. 1639b(c)(1). If after reviewing the study, the Secretary determines that consumers, while shopping, would not have sufficient access to the BE food disclosure through electronic or digital disclosure methods, the amended Act requires, after consultation with food retailers and manufacturers, additional and comparable options to access the BE food disclosure be provided. 7 U.S.C. 1639b(c)(4).

As required by the amended Act, AMS conducted a study in 2017. The study identified “potential technological challenges that may impact whether consumers would have access to the bioengineering disclosure through electronic or digital disclosure methods.” On September 6, 2017, the results of the study were made publicly available on the AMS website.<sup>1</sup> As described in the December 21, 2018, final rule establishing the standard, upon reviewing the results of the study, and in consideration of public comments on a proposed rule published on May 4, 2018 (83 FR 19860), the Secretary determined consumers would not, at that time, have sufficient access to the BE food disclosure through electronic or digital means under ordinary shopping conditions. 83 FR 65828. In response to the Secretary’s determination, and following consultation with food retailers and manufacturers and in consideration of public comments, AMS added a text message disclosure option at 7 CFR 66.108 as an additional and comparable option to access the disclosure. Accordingly, the current regulations provide four different disclosure options for food retailers and manufacturers to disclose the presence of a BE food or BE food ingredient: on-package text; the BE symbol; an electronic or digital link accompanied by a telephone number; and a text message. The requirements for on-package text disclosures are described at 7 CFR 66.102, which mandates that the on-package language must state “Bioengineered food,” “Contains a bioengineered food ingredient,” or, if multiple BE food ingredients are present, “Contains bioengineered food ingredients.” The BE symbol requirements are described at 7 CFR 66.104. The symbol can be found at <https://www.ams.usda.gov/rules-regulations/be/symbols>. The requirements for electronic or digital link disclosure are explained at 7 CFR 66.106, which mandates that the electronic or digital link be accompanied by on-package

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<sup>1</sup> The “Study of Electronic or Digital Link Disclosure: A Third-Party Evaluation of Challenges Impacting Access to Bioengineered Food Disclosure,” was made available to the public on September 6, 2017, at <https://www.ams.usda.gov/reports/study-electronic-or-digital-disclosure>.

statements that read, “Scan here for more food information” and “Call 1-000-000-0000 for more food information.” When accessed, the electronic or digital link product information page must include either the same language requirements of the on-package text disclosure in 7 CFR 66.102 or the symbol disclosure in 7 CFR 66.104. The requirements for the text message option are described at 7 CFR 66.108, which mandates an on-package statement that says “Text [command word] to [number] for bioengineered food information.” When the text message disclosure is used, the consumer must receive the BE food disclosure using the same language required for on-package text disclosures, as described at 7 CFR 66.102.

In September 2022, the Federal Court for the Northern District of California issued a decision addressing several claims raised in *Natural Grocers, et al. v. Vilsack, et al.* regarding the Standard. The Court found that AMS’s action of providing a text message disclosure option (7 CFR 66.108) as an additional and comparable option fell outside of the statutory authority of the amended Act and failed to address the problem of insufficient access to the BE disclosure through the electronic or digital link disclosure option. The Court concluded an additional and comparable disclosure option must be included with the electronic or digital link disclosure (7 CFR 66.106). The Court accordingly ordered that AMS reconsider the requirements in §§ 66.106 and 108.

## **II. Request for Information**

AMS is reevaluating the electronic or digital link disclosure option at 7 CFR 66.106 and is soliciting public input on potential revisions to the electronic or digital link disclosure option as it pertains to the Standard. Commenting parties should submit responses to questions and requests (1) through (8) below and, if available, provide data and other evidence to support any suggested revision. AMS will not consider comments providing recommendations that are not relevant to the questions and requests below.

- (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.

**Context:** AMS is interested in the availability of wireless internet or cellular networks. AMS has found that as of 2021, most Americans (97 percent) owned a cellphone of some kind and smartphone ownership was at 85 percent.<sup>2</sup> In particular, the Pew Research Center found that 89 percent of urban adults, 84 percent of suburban adults, and 80 percent of rural adults in America own a smartphone.<sup>3</sup> The Pew Research Center also found that 61 percent of individuals 65 and older own a smartphone.<sup>4</sup>

- (4) Provide information on the availability of broadband 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. **Context:** AMS is trying to determine if accessibility to information through electronic and digital disclosure in retail settings

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<sup>2</sup> Pew Research Center. 2021. Mobile Fact Sheet. Retrieved December 14, 2022, from <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

<sup>3</sup> Pew Research Center. 2021. Some digital divides persist between rural, urban, and suburban America. Retrieved December 15, 2022, from <https://www.pewresearch.org/fact-tank/2021/08/19/some-digital-divides-persist-between-rural-urban-and-suburban-america/>.

<sup>4</sup> Pew Research Center. 2022. Share of those 65 and older who are tech users has grown in the past decade. Retrieved January 17, 2023, from <https://www.pewresearch.org/fact-tank/2022/01/13/share-of-those-65-and-older-who-are-tech-users-has-grown-in-the-past-decade/>.

- 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. **Context:** AMS evaluates the costs that rulemaking would impose on regulated entities according to each type of disclosure option and is seeking additional data regarding how many products in the marketplace use each of the four currently available 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?

**Authority:** 7 U.S.C. 1621 *et seq.*

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