SUBMITTED VIA REGULATIONS.GOV

July 2, 2018

U.S. Department of Agriculture
Agricultural Marketing Service
Docket Clerk
1400 Independence Avenue SW
Room 4543-South
Washington, DC 20250

Re: National Bioengineered Food Disclosure Standard, Proposed Rule, Docket No. AMS-TM-17-0050, 83 Fed. Reg. 19,860 (May 4, 2018)

Dear Sir or Madam:

As one of our nation's largest food companies, Mars, Inc. (Mars) is pleased to submit these comments in response to the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service's (AMS) request for public comment on the National Bioengineered Food Disclosure Standard (NBFDS) proposed rule that would establish the requirements and procedures for disclosing bioengineered (BE) foods.[1]

Our comments ask that AMS deem labels that comply with the Vermont genetic engineering (GE) labeling law[2] as compliant with the NBFDS. Alternatively, we ask that products already labeled in compliance with the Vermont GE labeling law be deemed compliant with the NBFDS until January 1, 2022 – the same deadline by which the proposed rule would allow companies to use up existing label stock bearing no BE or GE disclosure at all[3] – regardless of whether the labels bearing the Vermont GE disclosure are printed by the initial compliance date.

As detailed below, Mars believes that either change would support AMS's stated goals of providing disclosure to consumers while minimizing implementation and compliance costs. Such flexibility seems particularly appropriate for companies like Mars that have been proactive and responsible in communicating to consumers about the use of bioengineering/genetic engineering in the production of foods they market but do not print large volumes of label stock in advance.

I. Mars Has Consistently Supported Efforts to Increase Consumer Transparency, Including Labeling for Genetically Engineered Foods.

Mars has consistently supported AMS's and FDA's efforts to help consumers make informed decisions about the food they purchase and consume by increasing the transparency of food labels. At Mars, we have always believed that our products made with GE ingredients are

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[1] National Bioengineered Food Disclosure Standard, Proposed Rule, 83 Fed. Reg. 19,860 (May 4, 2018) (BE Proposed Rule).
[2] Vermont Act No. 120 (H. 112) (May 8, 2014); Consumer Protection Rule C.P. 121.
[3] Proposed 7 C.F.R. § 66.120.

safe, and we ensure the safety of all raw materials used to make our products. At the same time, we take our consumer preferences seriously, and in acknowledgement of their requests for transparency, we supported the creation of a single, nation-wide labeling system for food products containing GE ingredients.[4]

While the NBFDS was still being debated in Congress, Mars decided to undergo the lengthy and expensive process of changing the labels of our products to comply with the Vermont GE labeling law by the July 2016 compliance date. To do so in a timely manner, as well as to respond to consumer demand, Mars invested millions of dollars and significant resources to update its labels. As Mars made this major change and serious investment, we took comfort in the fact that FDA supported the use of the term "genetic engineering." For example, in FDA's November 2015 final guidance on voluntary labeling for GE foods, FDA uses the terms "genetic engineering" and "bioengineering" interchangeably and notes that these terms, as well as others, "are often used interchangeably by industry, federal agencies, international bodies, and other interested stakeholders . . . ."[5] Mars relied on FDA's acceptance of the term "genetic engineering" in making what it expected would be a long-term label change to provide enhanced information to consumers. Mars began distributing products with the disclosures "produced with genetic engineering" or "partially produced with genetic engineering" in June 2016,[6] before Congress enacted the NBFDS on July 29, 2016.[7]

Although Vermont's law has been pre-empted by the federal mandate, Mars has continued to label our products with back-of-pack GE disclosure statements to honor our transparency efforts with consumers, pending the transition to a federally mandated disclosure. To date, the majority of our products sold in the U.S. include GE disclosure statements on the label, and we continue to roll out products labeled with GE disclosure statements where applicable to the products. We understand that many other companies made significant investments to comply with the Vermont GE law and may be similarly situated to Mars.

Separately, Mars has also been an early supporter of FDA's new Nutrition Facts label. Mars supports the agency's efforts to advance public health and nutrition by promoting the most recent nutrition science and improving consumer understanding of critical nutrition information.[8] In particular, Mars has been supportive of the new added sugars labeling requirements.[9]

Rolling out new labels for its approximately 2,700 stock keeping units (SKUs) is not a process that Mars takes lightly. A change to a SKU often triggers multiple artwork changes (including a primary wrap and a secondary paper box). Thus, changing 2,700 SKUs could require up to 5,400 label changes. Given these challenges, Mars has a lengthy and structured process for label changes required by a new law or regulation. First, Mars undergoes data gathering and planning, which can take between six months to one year and involves, among other things, interpreting new regulations, educating stakeholders, and updating system software. Second, Mars will redesign our labels and packages, including redesigning the package structure, brand elements, and label layouts, which takes between three and six

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[4] http://www.mars.com/global/about-us/policies-and-practices/gmo-policy.
[5] FDA, Guidance for Industry, Voluntary Labeling Indicating Whether Foods Have or Have Not Been Derived from Genetically Engineered Plants (Nov. 2015), https://www.fda.gov/Food/GuidanceRegulation/ucm059098.htm.
[6] Susanna Kim, *Candy Maker Mars Adding GMO Labeling to Its Products*, ABC NEWS, Mar. 22, 2016, https://abcnews.go.com/Business/candy-maker-mars-adding-gmo-labeling-products/story?id=37839000.
[7] 7 U.S.C. §§ 1639, 6524.
[8] http://www.mars.com/global/press-center/newsroom/our-view-fda-new-nutrition-facts-panel-rule.
[9] *Id.*

months. Finally, Mars will distribute information and packaging, including updating consumer and digital information, which takes another three to six months. Altogether, this process can take between 18 and 36 months. This work is done on a rotating cycle, as it can take years to get through these changes for all 2,700 SKUs.

II. AMS Should Deem Labels That Comply With the Vermont GE Labeling Law as Compliant With the NBFDS.

We respectfully request that AMS deem labels that comply with the Vermont GE labeling law as compliant with the NBFDS. The NBFDS contemplates a flexible standard, permitting the disclosure to be "a text, symbol, or electronic or digital link . . . with the disclosure option to be selected by the food manufacturer."[10] Given the flexibility that Congress envisioned, we ask that AMS include an option to use disclosures that comply with the Vermont GE labeling law, i.e., "produced with genetic engineering" and "partially produced with genetic engineering."

Allowing manufacturers to use labels that comply with the Vermont GE labeling law is entirely consistent with AMS's intentions in drafting the BE Proposed Rule. AMS explains that:

> The proposed rule is intended to provide for disclosure of foods that are or may be bioengineered in the interest of consumers, but also seeks to minimize implementation and compliance costs for the food industry . . . . To that end, AMS has tried to craft requirements that are clear and straightforward, incorporating flexibility where appropriate.[11]

Food labels that comply with the Vermont GE labeling law "provide for disclosure of foods that are or may be bioengineered." While the terminology on Vermont-compliant labels differs from that of the BE Proposed Rule (e.g., "produced with genetic engineering" compared to "bioengineered food"), consumers have come to understand that "genetically engineered," "genetically modified," "GMO," and "bioengineered" are synonymous terms. In fact, the terms "genetically engineered" or "genetically modified" are seen as more consumer-friendly as compared to the term "bioengineered," as consumers have been exposed to such terms for a longer period of time.[12] Thus, excluding terms such as "genetically engineered" or "GMO" as labeling options under the NBFDS could lead to consumer confusion.

Moreover, deeming labels that comply with the Vermont GE labeling law as compliant with the NBFDS will "minimize implementation and compliance costs" for Mars and similarly situated manufacturers and "incorporat[e] flexibility" into the rule. The Trump Administration has been clear that federal agencies must prudently manage and control their regulatory costs to minimize the compliance burden imposed on the public. For example, Executive Order 13,777 aims to "lower regulatory burdens on the American people by implementing and enforcing regulatory reform," announcing a policy of "alleviat[ing] unnecessary regulatory burdens placed on the American people."[13] The BE Proposed Rule, as currently worded, places an extreme regulatory burden on Mars and similarly situated manufacturers who changed their labels in reliance on FDA's acceptance of the term "genetic engineering" and to comply with Vermont's GE labeling law. Deeming labels that comply with the Vermont GE labeling law as compliant

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[10] 7 U.S.C. § 1639b(b)(2).
[11] 83 Fed. Reg. at 19,861.
[12] *E.g.*, http://www.justlabelit.org/usda-rule/; Scott Faber, *Food Labeling Rule Threatens to Further Undermine Consumer Trust*, EWG AGMAG, May 22, 2018, https://www.ewg.org/agmag/2018/05/food-labeling-rule-threatens-further-undermine-consumer-trust#.WwV_U9UvyYW.
[13] Exec. Order No. 13,777 (Feb. 24, 2017).

with the NBFDS will further the Administration's goals of minimizing the compliance burden on industry.

III. Alternatively, AMS Should Revise Proposed Section 66.120 to Deem Labels That Comply With the Vermont GE Labeling Law as Compliant With the NBFDS Until January 1, 2022.

Alternatively, if AMS does not grant the above request, Mars respectfully asks that AMS modify Section 66.120 to deem labels that comply with the Vermont GE labeling law as compliant with the NBFDS until January 1, 2022, regardless of whether such labels are printed by the initial compliance date. Under proposed 7 C.F.R. § 66.120, "[p]roducts that are manufactured, labeled, and entered into the stream of commerce prior to January 1, 2022, or until regulated entities use up remaining label inventories as of the initial compliance date, whichever date comes first, may be sold using their existing food labels."[14] In the preamble to the BE Proposed Rule, AMS states that Section 66.120 is meant to "reduce costs and burdens" on regulated entities by allowing them "to use up their current food labels for a period of time."[15] AMS explains that "regulated entities may use up labels ***printed*** by the initial compliance date, regardless of whether they comply with the NBFDS, until the regulated entity uses up remaining label inventories, or until January 1, 2022, whichever date comes first."[16] AMS further notes that, under this proposal, regulated entities need not change labels of existing food products that have entered the stream of commerce prior to January 1, 2022.[17]

Mars appreciates that the intent of Section 66.120 is to reduce costs and burdens on regulated entities by allowing them to use up current food labels for a period of time. However, the proposed wording of Section 66.120 will render the provision inapplicable to Mars and other companies that were diligent in changing their labels to comply with the Vermont GE labeling law but do not print large volumes of label stock in advance. Due to the large number of products for which Mars must design and print labels (over 2,700 SKUs), Mars typically only prints stocks of labels that will last five weeks. As noted above, Mars would need substantial time to redesign its labels again to comply with the BE Proposed Rule, if finalized in its present form, for all relevant products. Yet, under proposed Section 66.120, Mars would enjoy no benefit from the additional compliance period, as the provision as currently drafted would appear to apply only to labels "***printed*** by the initial compliance date."[18] Considering Mars' efforts to support transparent labeling initiatives, including compliance with Vermont's GE labeling law and the updated Nutrition Facts label, Mars asks that AMS revise Section 66.120 to provide equitable relief to Mars and similarly situated manufacturers who responsibly changed their labels to comply with the Vermont GE labeling law but do not print large quantities of their labels in advance.

To that end, we propose the following minor modifications to proposed Section 66.120:

§ 66.120 Use of existing food label~~s inventories~~.

Products that are manufactured, labeled, and entered into the stream of commerce prior to January 1, 2022, or until regulated entities use up remaining label inventories as of the initial compliance date, whichever date comes first, may be

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[14] 83 Fed. Reg. at 19,888.
[15] *Id.* at 19,879.
[16] *Id.* (emphasis added).
[17] *Id.*
[18] *Id.* (emphasis added).

sold using their existing food labels. Products labeled in compliance with Vermont's genetic engineering labeling law (Vermont Act 120) may be sold using their existing food labels until January 1, 2022.

As with the above suggested modification, these changes to Section 66.120 are wholly consistent with AMS's intentions in drafting the BE Proposed Rule, as the modifications provide for disclosure of foods that are or may be genetically engineered and minimize compliance and implementation costs for industry.

IV. Conclusion

Mars appreciates this opportunity to submit comments regarding the BE Proposed Rule and thanks AMS for its consideration of our limited request. We look forward to continuing to partner with AMS throughout this process. Should AMS have any questions or desire additional information from Mars, please do not hesitate to contact Kelly Horton, North America Policy Director at kelly.horton@effem.com or via phone at 571-279-1738.

Respectfully submitted,

Brad Figel
Vice President Public Affairs North America
Mars, Incorporated
6885 Elm Street
McLean, VA 22101