



Food & Beverage ADVISORY ■

SEPTEMBER 16, 2022

Bioengineered Food Disclosure: QR Code and Text Message Disclosure Requirements Remanded to Agency

By [Sam Jockel](#) and [Rachel Lowe](#)

As we [previously reported](#), 19 months after the National Bioengineered Food Disclosure Standard (NBFDS) final rule—which established the United States’ first federal mandatory bioengineered food disclosure requirements—was published, a coalition of nonprofit organizations and food retailers filed a lawsuit against the U.S. Department of Agriculture (USDA) and the Agricultural Marketing Service (AMS). The lawsuit claimed key aspects of the NBFDS final rule allegedly failed to abide by the NBFDS Act and violated the Administrative Procedure Act (APA). The plaintiffs challenged:

- AMS’s decision to allow QR codes as a stand-alone disclosure (albeit with the mandated inclusion of a phone number).
- The exclusion of the terms “GE” and “GMO” in the standard.
- The alleged effective exclusion of highly refined foods from disclosure based on a demonstration that modified genetic material is not “detectable.”
- The purported restriction on the use of industry’s “right” to label foods produced through “genetic engineering” or as “genetically engineered” as prohibiting commercial speech in violation of the First Amendment.

In November 2021, the plaintiffs moved for summary judgment. AMS and industry intervenors (United States Beet Sugar Association, American Sugarbeet Growers Association, and American Farm Bureau Federation) filed oppositions.

On September 13, 2022, the court issued its highly anticipated ruling.

- *QR Code/text message disclosure*: The court found that the plaintiffs’ challenge to the USDA’s decision to implement a stand-alone text message disclosure option was arbitrary and capricious. During the rulemaking process, the USDA determined, based on a study of the accessibility of the electronic/digital link disclosure, that there would not be sufficient access through the electronic/digital link disclosure method and in response implemented a text message disclosure as an additional disclosure option. Under the NBFDS Act, the USDA was required to provide “additional and comparable options to access the bioengineering disclosure” if it determined there was insufficient access through the electronic/digital link method. The USDA argued that

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

the text message option (not required by the NBFDS Act) was an “additional and comparable” option, but the court agreed with the plaintiffs in concluding that the USDA was required to provide options “to improve the accessibility of the electronic disclosure method” and found that providing a separate text message disclosure option did not “fix the problem of inaccessible electronic disclosures.”

- The court remanded without vacatur 7 C.F.R. Sections 66.106 (requirements for the electronic/digital link disclosure) and 66.108 (requirements for the text message disclosure) of the final NBFDS rule. In other words, based on the order, the USDA will need to review these requirements for further consideration, but they remain in effect for now.
- *Terminology*: The court found that AMS’s decision to use the term “bioengineered” instead of “GE” and “GMO” was “reasoned and reasonable” in light of the NBFDS Act and the agency’s consideration of this issue during the rulemaking process.
- *Highly refined foods*: The court concluded that AMS’s actions in implementing a genetic material detectability standard for refined ingredients were not in violation of the APA, upholding the central elements of the requirements related to what foods require disclosure under the NBFDS (the List of Bioengineered Foods and the detectability requirements).
- *First Amendment challenges*: The court determined that the plaintiffs lacked standing in their free speech challenge, in part because neither the NBFDS Act nor the regulations forbid the plaintiffs from using “GE, GMO, or any other words they want in their communications with consumers.”

Overall, aside from the text message and electronic/digital link disclosure regulations, the court denied all other aspects of the plaintiffs’ challenge.

Takeaways

With the exception of the electronic/digital link and text message disclosure options, the ruling leaves the NBFDS requirements—including the “bioengineered” food language used for mandatory disclosure and the requirements pertaining to what foods actually require disclosure in the first instance—intact. In response to this ruling, we will be watching for two things: (1) whether the USDA or plaintiffs will appeal this order to the Ninth Circuit; and (2) rulemaking proceedings that reconsider/revise 7 C.F.R. § 66.106 and 7 C.F.R. § 66.108, the regulations that prescribe the requirements for the electronic/digital link and text message disclosures.

For entities currently using QR codes or text message disclosures, these requirements will remain unchanged while AMS considers the remanded issues in the court’s order. Nevertheless, regulated entities should continue to work with their counsel to monitor regulatory developments that may address changes to these disclosure options, including opportunities to comment on them.

You can subscribe to future *Food & Beverage Digests* and other Alston & Bird publications by completing our [publications subscription form](#).

If you would like more information, please feel free to contact one of the attorneys on our **Food & Beverage Team**.

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2022

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86 10 8592 7500
BRUSSELS: Rue Guimard 9 et Rue du Commerce 87 ■ 3rd Floor ■ 1000 Brussels ■ Brussels, 1000, BE ■ +32.2.550.3700 ■ Fax: +32.2.550.3719
CHARLOTTE: One South at The Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
FORT WORTH: Bank of America Tower ■ 301 Commerce ■ Suite 3635 ■ Fort Worth, Texas, USA, 76102 ■ 214.922.3400 ■ Fax: 214.922.3899
LONDON: 4th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
SILICON VALLEY: 1950 University Avenue ■ Suite 430 ■ East Palo Alto, California, USA 94303 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333