

UPDATE

Food and Drug Law, Regulation and Education



2016 ANNUAL CONFERENCE RECAP





One State to Rule Them All? The Impact of Vermont's GMO Labeling Law

By Deborah C. Attwood

That countdown clock just keeps on ticking. Vermont's GMO labeling law was one of the hottest food topics at this year's FDLI conference, particularly the oversized impact that one state's law is having on the food industry. By the time this issue of *Update* reaches FDLI's members, the most significant date will have just passed, the July 1, 2016 deadline for Act 120 and its implementing regulations; after this date, all food and beverages sold in Vermont that are entirely or partially produced with genetic

engineering (GE), subject to certain exemptions, must be properly labeled.¹

By now, any lawyer or consultant with a food practice has likely received at least one question about the Vermont law and how it is going to be implemented. Yet outside of the compliance issues, a question with broader implications remains—how can one state's law become a de facto national requirement? This question was addressed in a breakout session, “GMO Labeling—Mandatory vs. Voluntary” on the first day of the Annual Conference. A diverse group of experts offered insight into the problem; the panel was composed of Steven H. Armstrong, Chief Food Law Counsel, Campbell Soup Company, and Member, FDLI Board of Directors, Gregory Jaffe, Director of the Project on Biotechnology, Center for Science in the Public Interest, Karin Moore, Senior Vice President and General Counsel, Grocery Manufacturers Association (GMA), and was moderated by Stuart M. Pape, Shareholder, Polsinelli PC.



Deborah C. Attwood is an associate in the Washington, DC office of Steptoe & Johnson, LLP. Her practice focuses on the regulation of human and pet food, animal feed, food and drug packaging, and medical devices.



CFSAN Center Director Breakout Session

Most state-based efforts to establish, either through legislation or ballot initiatives, labeling requirements for foods produced using GE have failed. Of those few (three) that have succeeded, most—Connecticut and Maine—have not been implemented.² Millions of dollars have been spent simultaneously fighting these efforts while seeking a federal legislative solution.³ Although the industry position has long been that labeling of GE foods is unnecessary, the desire to avoid a patchwork of state legislation ultimately has led to the conclusion that federal legislation is the best solution. Despite the introduction of various bills, however, none have yet come particularly close to passage.

Federal agencies continue to deal with the ramifications of Vermont's GE-labeling law. After FDLI's Annual, at a May 25 conference held by the Organic Trade Association, none other than the Secretary of the U.S. Department of Agriculture (USDA), Tom Vilsack, called for a national GE labeling solution, even as USDA takes action to meet rising demand for sources of non-GE ingredients.⁴ In November 2015, the U.S. Food

and Drug Administration (FDA) issued nonbinding guidance for voluntary labeling indicating whether foods have or have not been derived from GE plants, to help companies use language that FDA would consider truthful and non-misleading.⁵ FDA also will need to address GM labeling as part of its forthcoming decision on potentially developing a definition for use of the term "natural" in the labeling of human food products.⁶ Under Vermont's Act 120, food produced with genetic engineering also is prohibited from having any words identifying it as "natural" on the label or in advertising.⁷

No controversial legislation is complete without associated litigation. In June 2014, the GMA filed a lawsuit in federal district court, claiming that Act 120 is unconstitutional because it compels speech and is preempted by federal law.⁸ In April 2015, the judge denied GMA's motion for preliminary injunction, which would have prevented Act 120 from going into effect before the litigation was resolved.⁹ GMA has appealed this decision to the Second Circuit Court of Appeals; this appeal has not yet

stopped the rest of the case from moving forward toward trial, although both sides recently asked the district court to delay the trial pending the outcome of the Second Circuit's decision, on the basis that the appeals court has been asked to opine on plaintiffs' assertion that they are likely to win at trial.¹⁰ Although the Second Circuit heard oral argument in October 2015, a decision has not yet been published and as the litigation currently stands, Act 120 will go into effect as scheduled. Moreover, notwithstanding the outcome of this appeal, the district court must still rule on the substantive issues.

This has left Vermont with a first-in-the-nation law that is causing the food industry an outsized headache while deciding on a compliance strategy. One option is for manufacturers to decide to withdraw from the Vermont market and not offer their food for retail sale. However, there is no guidance on how the Vermont Attorney General's Office, which is responsible for enforcing Act 120, will address food that is properly labeled "not intended for retail sale in Vermont" but nevertheless is sold in Vermont despite the manufacturer's best efforts and intentions.

Another option is to wait and see whether federal legislation is forthcoming or if the litigation results in a stay to the law; this approach is possible because some foods have longer shelf-lives, so for six months after the law's effective date, i.e., until January 1, 2017, improperly labeled foods offered for retail sale in Vermont are presumed to have been packaged and distributed to the retailer prior to July 1, 2016.¹¹ Unless there is evidence that the food was distributed to the retailer on or after July 1, 2016, the Vermont AG's office has confirmed that it will not bring an enforcement action or seek fines for those products.¹² This

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is a risky option, of course, as this could lead to heightened attention due to being considered a willful violator of the law.

What has been happening instead is that a number of major companies, including Mars, Campbell Soup, and General Mills, have announced that they will implement Vermont-compliant labels nationwide. Other companies, while not making a major announcement, have quietly begun labeling.¹³ For now, this approach provides these companies regulatory certainty while reflecting the practical reality that it takes a long time to change the packaging for thousands of products! Of course, should federal legislation become a reality, these early adopters may be faced with the need to change their labels once again.

Looking more broadly, one interesting conclusion has to be the success of the nationwide campaign, conducted state-by-state, to bring about GE labeling for foods. Despite repeated failures at both the state and national level, proponents of GE labeling continued fighting and ultimately got the one success they needed. In 2014, Vermont's economy represented 0.2% of the U.S. gross domestic product (GDP).¹⁴ By comparison, California, the state we usually see leading the charge, represented 13.3%. A GE labeling ballot initiative in California was defeated in November 2012,¹⁵ yet many food products in California will now include GE labeling as a result of the victory in Vermont. Will this model be reenacted for other hot-button issues? It is an extremely costly and resource-intensive approach, with an uncertain outcome.

Indeed, with the litigation still pending and federal legislation a possibility, Vermont's Act 120 may not survive. Senate Agriculture Committee Chairman Pat Roberts was recently quoted as saying "I'm not going to wait around and let the Vermont label happen . . . I'm just not going to do that. So we'll have a vote, one way or the other, and we'll see what the outcome is."¹⁶ This comment illustrates the potential demise of Vermont's Act 120. Nevertheless, as federal GE labeling legislation was virtually unthinkable just a few years ago, to have come this far demonstrates the potential power that can be wielded by one state over a national industry. ▲

1. Vt. Stat. Ann. tit. 9, § 3043 (2015).
2. See Center for Food Safety's 2016 State Labeling Legislation Map, http://salsa3.salsalabs.com/o/1881/p/salsa/web/common/public/content?content_item_KEY=14210 (last visited May 31, 2016); Conn. Gen. Stat. § 21a-92c (2016); Me. Rev. Stat. Ann. tit. 22, § 2591 (2016).
3. Libby Foley, *Corporate Spending to Fight GMO Labeling Skyrockets*, Environmental Working Group (last visited May 31, 2016), <http://www.ewg.org/research/anti-label-lobby>.
4. U.S. Department of Agriculture, *USDA Increases FY 2016 U.S. Sugar Overall Allotment Quantity and Raw Cane Sugar Import Access*, news release No. 0119.16, <http://www.usda.gov/wps/portal/usda/usdahome?contentid=2016/05/0119.xml> (last visited May 31, 2016).
5. U.S. Food & Drug Admin., *Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Derived from Genetically Engineered Plants* (Nov. 2015), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/ucm059098.htm> (last visited May 31, 2016).

6. 80 Fed. Reg. 69905 (November 12, 2015).
7. Vt. Stat. Ann. tit. 9, § 3043(c).
8. See *Grocery Mfrs. Ass'n v. Sorrell*, No. 5:14-CV-117 (D. Vt. June 12, 2014).
9. See Order Denying Motion for Preliminary Injunction, *Grocery Mfrs. Ass'n v. Sorrell*, No. 5:14-CV-117 (D. Vt. June 12, 2014) (No. 95).
10. See Joint Motion to Reschedule Status Conference and Continue the Trial-Ready Date, *Grocery Mfrs. Ass'n v. Sorrell*, No. 5:14-CV-117 (D. Vt. May 2, 2016).
11. Consumer Protection Rule 121, <http://ago.vermont.gov/assets/files/PressReleases/Consumer/Final%20Rule%20CP%2020121.pdf> (last visited May 31, 2016).
12. Memorandum from Attorney General William H. Sorrell, *Updated AGO Enforcement Priorities for Act 120 (GE Food Labeling Law)* (May 16, 2016), http://www.ago.vermont.gov/assets/files/Consumer/GE_Food/AGO%20GE%20Food%20Labeling%20Law%20Enforcement%20Priorities%20Memo.pdf (last visited May 31, 2016).
13. Chris Moran, *Pepsi, Frito-Lay Quietly Adding GMO Ingredient Labels To Some Foods*, Consumerist (May 11, 2016), <https://consumerist.com/2016/05/11/pepsi-frito-lay-quietly-adding-gmo-ingredient-labels-to-some-foods/> (last visited May 31, 2016).
14. U.S. Bureau of Economic Analysis, *Broad Growth Across States in 2014*, Table 4, news release (June 10, 2015), http://www.bea.gov/newsreleases/regional/gdp_state/2015/pdf/gsp0615.pdf (last visited May 31, 2016).
15. *California Proposition 37, Mandatory Labeling of Genetically Engineered Food (2012)*, Ballotpedia, [https://ballotpedia.org/California_Proposition_37_Mandatory_Labeling_of_Genetically_Engineered_Food_\(2012\)](https://ballotpedia.org/California_Proposition_37_Mandatory_Labeling_of_Genetically_Engineered_Food_(2012)) (last visited May 31, 2016).
16. Casey Wooten, *De Facto GMO Labeling System Causes Confusion: Vilsack*, Bloomberg BNA (May 26, 2016), <http://www.bna.com/de-facto-gmo-n57982073049/> (last visited May 31, 2016).