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USDA Rulemaking Will Determine Success of Disclosure Law on Genetically-Engineered Food

by U.S. Congressman Mike Pompeo

Genetically altering crops and livestock to improve the production and quality of food has been practiced for thousands of years. Over the last half-decade, technical advances in DNA sequencing and computational biology have significantly enhanced our society's ability to improve the quality, safety, and production of food on the cellular level through genetic engineering (GE). GE technology allows American farmers to feed a rapidly growing global population that is projected to expand by two billion over the next 30 years.

Scientific evidence validating the safety of GE technology is extensive and undeniable. Today, over 45 percent of major crops grown in the U.S. are GE products, and there has not been a single shred of evidence indicating that the production or consumption of GE products has harmed consumers or the environment. The U.S. Department of Agriculture (USDA) and the Food and Drug Administration (FDA) have strongly approved GE products and have concluded that the use of GE technology need not be indicated on food labels.

Despite this overwhelming consensus from the scientific community and the federal government, anti-GE movements continue to spread false and misleading information. In recent years, these anti-GE activists have turned to state and local governments to advance their radical agendas. As a result, numerous state and local measures to restrict the use of GE foods or mandate labeling disclosures have been considered across the country.

Most anti-GE legislative efforts have failed to win or been struck down in court as conflicting with federal law or violating the First Amendment. Federal courts remain split, however, on the level of constitutional scrutiny judges should apply to such labeling mandates. Furthermore, FDA's regulation of GE foods is only partially covered by an express preemption provision in the Nutritional Labeling and Education Act of 1990. This lack of clear judicial precedent and complete federal preemption left the door open for anti-science activists to push their agendas locally.

In May 2014, Vermont became the first state to require labels on products containing genetically engineered ingredients. If left unchallenged, Vermont's law would have started a patchwork of individual state labeling laws that would been disastrous for commodity supply chains, and ultimately, American food producers, small businesses, and consumers. Individual state mandatory labeling laws would force companies to create separate supply chains and state-specific delivery mechanisms in order to comply, at an astronomical cost.

A recent economic impact analysis[*] estimated that the Vermont food labeling law would have cost consumers as much as $81.9 billion annually. With the passage of the Vermont law in 2014, many food producers began changing ingredient sources and spending large amounts of capital on new packaging in an effort to avoid the potential new litigation spree that the law likely would have created.

[*] John Dunham, Cost Impact of Vermont's GMO Labeling Law on Consumers Nationwide, John Dunham & Assoc., Feb. 21, 2016.

Congressman Mike Pompeo represents the 4th District of Kansas. Currently in his third term, Congressman Pompeo serves on the House Energy and Commerce Committee and the Permanent Select Committee on Intelligence.

With other states, most notably Connecticut and Maine, likely to follow Vermont's lead, it became clear that something had to be done to prevent disaster. Given the urgency of the situation, waiting for a legal challenge to play out, however likely it would be to succeed, was not a viable option. Congressional action was needed to pass a federal labeling standard expressly preempting state and local GE-labeling regulations.

American food producers and farms prompted efforts to craft a bill. H.R. 1599, the Safe and Accurate Food Labeling Act, which I sponsored, was introduced in the House of Representatives to preempt state and local GE-labeling laws and create a voluntary labeling program through the USDA for foods with or without genetically-engineered organisms. In Congress, garnering support for the measure and educating members about GE technology and the implications of the Vermont law proved challenging at first. Like me, many of my conservative colleagues generally disapprove of legislation that cedes state government power to Washington. However, this was a truly unique situation where federal preemption was necessary to maintain the proper functioning of our free markets. Once we laid out the facts, it became clear that H.R. 1599 was not a federal power grab, but rather a much-needed clarification designed to prevent fanatics from hijacking our nation's food commodity markets. With a strong showing of support, H.R. 1599 passed the House by a bipartisan vote of 275-150 in July, 2015.

Passing a bill in the Senate proved more difficult. The hysteria drummed up by anti-GE groups presented significant challenges that prevented Senate Democrats from garnering enough support to pass the House bill. Concessions had to be made and negotiations over a final solution carried on for well over a year. In July 2016, Congress successfully passed S.764, which established a national GE food-disclosure standard and preempted state and local labeling laws. On July 29, 2016, President Obama signed the bill into law.

S. 764 is undoubtedly the most consequential agriculture-related law in the past two decades. While I preferred my original House bill, S. 764 still accomplishes our ultimate goal of preempting the Vermont law and restoring certainty to the marketplace. Instead of setting a standard of voluntary disclosure like H.R. 1599, this new law requires food manufacturers to identify GE foods via on-package text, a symbol, or a digital link, and defines GE food as that which contains genetic material that has been modified and "for which the modification could not otherwise be obtained through conventional breeding or found in nature." Despite the passage of S. 764, the GE-labeling battle is far from over.

The focus now moves to USDA, which will determine the technical details of the new national food-labeling standards. Under S. 764, USDA has two years to establish and implement nationwide labeling requirements through a formal rulemaking. The department is charged with determining the threshold of GE ingredients within food products that will require labeling and the standards for permissible disclosure labels. It must also complete a study on whether or not the QR code or online link labeling options provide sufficient access to information, a provision which could undermine the new law if such forms of disclosure are found to be insufficient.

It will be a challenging two years at USDA. The agency will have to endure the onslaught of anti-GE activists. They will use the process as an opportunity to further stigmatize GE technology and expand their support. Food producers, retailers and agriculture groups will rightfully be pushing hard to make sure ingredient thresholds are reasonable and that the final standards do not inhibit the development of new technologies.

Agriculture Secretary Tom Vilsack has done an outstanding job thus far at working with all interested parties. With 2017 fast approaching, he will have to move the rulemaking process forward quickly before the next administration takes over. The anti-GE groups will undoubtedly come out in full, unhinged force to test USDA at every turn in the rulemaking process. They will likely challenge the final product in court. I am confident that USDA will be able to overcome these many challenges and implement a reasonable, science-based solution. However, it is crucial that the same coalition of farmers, scientists, food producers and retailers who worked so tirelessly to achieve a legislative solution are there to counter the anti-GE activists with the facts.

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