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The Dickinson  
School of Law

GMO Labeling Update  
Professor Ross H. Pifer

## **Update: Current Legal Developments in GMO Labeling Laws**

Agricultural and Food Law Consortium  
Webinar Series

July 30, 2015

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GMO Labeling Update  
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## **GMO Labeling Update Overview of Presentation**

- Historical Development of Debate
- Unsuccessful Ballot Measures
- Review of Enacted State Statutes
- Vermont Litigation
- Federal Legislation
- USDA Process Verified Program

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## **GMO Labeling Update** **Overview of Presentation**

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## **Regulatory Framework for GMOs** **General Principles**

- **Coordinated Framework for Regulation of Biotechnology (1986)**
  - **Established by White House Office of Science and Technology Policy**
  - **Provides foundation for existing regulatory framework**

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## Regulatory Framework for GMOs General Principles

- **Coordinated Framework for Regulation of Biotechnology (1986)**
  - Biotechnology poses no unique risks
  - Products of biotechnology, not the process, should be regulated
  - Regulation based upon verifiable scientific risks
  - Existing statutes are sufficient to regulate GM products

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## GMO Labeling Update Legal Developments Generally

- Legal developments have been most active at the state level.
- Minimal legal developments have occurred at the federal level.
  - **Until this year**

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## Updating the Framework Office of Science and Technology Policy

- July 2, 2015 blog post
  - Improving Transparency and Ensuring Continued Safety in Biotechnology
- July 2, 2015 memo to FDA, EPA, and USDA
  - Modernizing the Regulatory System for Biotechnology Products
  - Update Coordinated Framework within one year

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## **Mandatory GMO Labeling** **Oregon Measure No. 27**

- November 5, 2002 General Election
- Would have required plainly visible label containing the words “Genetically Engineered.”
- Defeated by 70-30 margin.

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## **Mandatory GMO Labeling** **California Proposition 37**

- November 6, 2012 General Election
- The California Right to Know Genetically Engineered Food Act
  - “Commencing July 1, 2014, any food offered for retail sale in California is misbranded if it is or may have been entirely or partially produced with genetic engineering and that fact is not disclosed:”

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## **Mandatory GMO Labeling** **California Proposition 37**

- **Arguments for:**
  - You have right to know what is in food.
  - You will have information you need to make decision about foods that some doctors and scientists say are linked to allergies and other health risks.
  - Over 40 other countries require labels.

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## **Mandatory GMO Labeling** **California Proposition 37**

- **Arguments against:**
  - Creates government bureaucracy
  - Increases costs
  - Provides no health or safety benefits
  - Full of special-interest exemptions
  - Encourages frivolous litigation

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## **California Proposition 37** **Enforcement Provisions**

- “[A]ny person” had standing to initiate enforcement proceedings.
- Attorney’s fees and reasonable costs could be awarded to person or organization that initiated enforcement proceedings.
- There was no provision for the award of attorney’s fees to the defendant in an unsuccessful enforcement proceeding.

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## **Mandatory GMO Labeling** **California Proposition 37**

- **Results:**
  - Yes – 6,088,714 (48.59%)
  - No – 6,442,371 (51.41%)
- **Who really won?**

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## **Mandatory GMO Labeling** **Washington Initiative 522**

- **November 5, 2013 General Election**
- **Results:**
  - **Yes – 857,511 (48.91%)**
  - **No – 895,557 (51.09%)**
- **Similarity to California**
  - **Substance, process, and result**

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## **Mandatory GMO Labeling** **2014 Ballot Initiatives**

- **Oregon Measure 92**
  - **Contains citizen suit provision with opportunity to recover attorney's fees**
  - **Violations require knowing or intentional use of genetic engineering**
  - **Results as certified following recount:**
    - **Yes – 752,737 (49.97%)**
    - **No – 753,574 (50.03%)**

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## Mandatory GMO Labeling 2014 Ballot Initiatives

- **Colorado Proposition 105**
  - Did not authorize private rights of action
  - Exemptions generally mirrored those of New England statutes
  - **Results:**
    - Yes – 686,093 (34%)
    - No – 1,304,217 (66%)
    - Only 3 counties recorded more yes than no votes.

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## **Mandatory GMO Labeling** **Connecticut Public Act 13-183**

- Signed by Governor on June 25, 2013
- Requires labeling of:
  - food intended for human consumption
  - Seed or seed stock that is intended to produce food for human consumption
- “Produced with Genetic Engineering”

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## **Mandatory GMO Labeling** **Connecticut Public Act 13-183**

- Exceptions:
  - Alcoholic beverages
  - Restaurants
  - Sold by farmer to consumer
  - Non-GE animal fed GE food

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## **Mandatory GMO Labeling** **Connecticut Public Act 13-183**

- **Enforcement:**
  - Enforced by Commissioner of Consumer Protection
  - Requires knowing violation

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## **Mandatory GMO Labeling** **Connecticut Public Act 13-183**

- **Effective when:**
  - 4 states, including 1 that borders Connecticut, enact mandatory labeling laws
  - Aggregate population of Northeastern US (9 states) that have mandatory labeling laws exceeds 20 million
    - Population of 6 New England states = 14.4 million

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## **Mandatory GMO Labeling** **Maine LD 718 (HP 490)**

- **An Act to Protect Maine Consumers' Right to Know about Genetically Engineered Food**
- **Enacted without Governor's signature on Jan. 12, 2014.**

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## **Mandatory GMO Labeling** **Maine LD 718 (HP 490)**

- **"Beginning 18 months after the effective date of this section, any food offered for retail sale that is genetically engineered must be accompanied by a conspicuous disclosure that states "Produced with Genetic Engineering."**
- **Effective when 5 contiguous states, including Maine, enact mandatory labeling laws**

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## **Mandatory GMO Labeling** **Maine LD 718 (HP 490)**

- **Exceptions:**
  - **Alcoholic beverages**
  - **Restaurants**
  - **Medical foods**
  - **Non-GE animal fed GE food**
  - **Produced without knowledge of GE status**
  - **GE ingredients less than .9% of total weight**

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## **Mandatory GMO Labeling** **Vermont Act 120**

- **Signed into law on May 8, 2014.**
- **Will become effective on July 1, 2016**
- **Labeling required if food is “entirely or partially produced with genetic engineering.”**
- **Label must indicate “produced with genetic engineering”, “partially produced with genetic engineering”, or “may be produced with genetic engineering.”**

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## **Mandatory GMO Labeling** **Vermont Act 120**

- **Exceptions:**
  - Alcoholic beverages
  - Food prepared for immediate consumption
  - Food containing *de minimus* amount of GMOs
  - Food produced without knowing or intentional use of GMOs
  - Medical foods
  - Non-GE animal fed GE food

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## **Mandatory GMO Labeling** **Vermont Act 120**

- **Enforcement:**
  - Enforced by Attorney General
  - Civil penalty of up to \$1000 per day per product

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## Mandatory GMO Labeling Vermont Act 120

- Statute created Special Fund to be used in any potential litigation.
- Litigation filed on June 12, 2014 in the United States District Court for the District of Vermont by Grocery Manufacturers Association, Snack Food Association, International Dairy Foods Association, and National Association of Manufacturers.

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## **Mandatory GMO Labeling**

### ***GMA v. Sorrell, Docket No. 5:14-CV-117***

- **According to allegations in Complaint, Plaintiffs:**
  - “must revise hundreds of thousands of product packages”
  - “must establish Vermont-only distribution channels” to comply with Vermont’s speech requirements
  - may be required to revise labels of all products sold in United States.

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## **Mandatory GMO Labeling**

### ***GMA v. Sorrell, Docket No. 5:14-CV-117***

- **Legal claims:**
  - Violates First Amendment - “imposes burden on protected speech”
  - Violates Commerce Clause
    - Cost of regulation will be borne by out-of-state companies
    - Regulation likely necessitate revision of labeling and marketing on a national level

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## **Mandatory GMO Labeling**

### ***GMA v. Sorrell, Docket No. 5:14-CV-117***

- **Legal claims:**
  - **Preempted by a variety of federal labeling laws**
    - **Federal Food, Drug, and Cosmetic Act**
    - **Nutrition Labeling and Education Act**
    - **Federal Meat Inspection Act**
    - **Poultry Products Inspection Act**

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## **Mandatory GMO Labeling**

### ***GMA v. Sorrell, Docket No. 5:14-CV-117***

- **Procedural history:**
  - **Apr. 27 Opinion and Order**
  - **Dismissed some, but not all, claims**

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## Mandatory GMO Labeling

### *GMA v. Sorrell, Docket No. 5:14-CV-117*

- Legal claims:
  - Violates First Amendment - “imposes burden on protected speech”
    - Claim survives but will be difficult for Plaintiffs to prevail with exception of “natural” restriction
  - Violates Commerce Clause
    - Claim dismissed except for “natural” restriction

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## Mandatory GMO Labeling

### *GMA v. Sorrell, Docket No. 5:14-CV-117*

- Legal claims:
  - Preempted by a variety of federal labeling laws
    - Federal Food, Drug, and Cosmetic Act
      - Dismissed
    - Nutrition Labeling and Education Act
      - Dismissed
    - Federal Meat Inspection Act
      - Not dismissed but no evidence of GM food
    - Poultry Products Inspection Act
      - Not dismissed but no evidence of GM food

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## **Mandatory GMO Labeling** ***GMA v. Sorrell, Docket No. 5:14-CV-117***

- **Procedural history:**
  - **Apr. 27 Opinion and Order**
  - **Dismissed some, but not all, claims**
  - **Appeal filed on May 6, 2015**
  - **Underlying case and appeal both continuing to proceed**

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## **GMO Labeling Update** **Federal Legislative Activity**

- **Genetically Engineered Food Right-to-Know Act (S. 511, H.R. 913)**
  - Would impose mandatory labeling requirements
- **Safe and Accurate Food Labeling Act (H.R. 1599)**
  - Would impose standards on voluntary labeling
- **Genetically Engineered Salmon Risk Reduction Act (S. 738)**

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## **GMO Labeling Update** **Safe and Accurate Food Labeling Act**

- **July 23 – passed House by 275-150 vote**
- **Impact of legislation regarding GMO labeling, if enacted:**
  - Shifts issue from states to federal government
  - Shifts regulatory framework from mandatory to voluntary

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## **GMO Labeling Update**

### **Safe and Accurate Food Labeling Act**

- **Section 201 – Genetic Engineering Certification**
  - USDA “shall establish a voluntary genetically engineered food certification program. . .”
  - USDA “shall establish a seal . . .”
  - Nongenetically Engineered Food Plan
  - Accreditation Program
- **Section 203 – Preemption**

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## **GMO Labeling Update**

### **Safe and Accurate Food Labeling Act**

- **Section 301 – Labeling of Natural Foods**
  - “Natural” claim can only be made in accordance with defined terms.
- **Section 302 – Regulations**
  - FDA has 18 months to issue proposed regulations.
  - FDA has 30 months to issue final regulations.
- **Section 303 - Preemption**

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## GMO Labeling Update Process Verified Program

- Voluntary program administered by USDA AMS
- Allows companies to make marketing claims and use “USDA Process Verified” shield
- Includes auditing requirement

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## Process Verified Program Examples

- Birds are never given antibiotics
- Raised by independent farmers
- Raised cage free
- Traceable from birth through harvest and fabrication

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## Process Verified Program SunOpta

- **May 1, 2015 – Dear Employees letter from Sec. Vilsack**
  - Leading company requested verification
  - AMS worked with company to develop verification processes
  - “[O]ther companies are already lining up to take advantage of this service.”

**SunOpta**  
 Process Verified Non-GMO/GE Program  
 HOPE, MN: SOYBEANS & CORN

**NON-GMO/GE PROCESS VERIFIED**

SunOpta's Hope, MN location is the first facility to receive certification for our non-GMO/GE program through the USDA's Process Verified Program (PVP). The program makes it possible to label our food-grade soybeans and corn as non-GMO/GE.

SunOpta has a long history in identity preserved grains and has been utilizing programs to trace desirable characteristics since 1978—long before GMO/GEs were even introduced! Throughout the years we've traced characteristics such as protein levels, oil content and non-GMO/GEs throughout the supply chain to verify that our customer's product fits their exact specifications.

SunOpta's Hope facility became USDA PVP certified non-GMO/GE for a number of reasons:

- Soybeans & Corn have high potential for unintended presence of GMO/GE materials.
- We value consumer education and want to help reinforce the right messaging by focusing on commodities where GMO/GE varieties exist.
- We utilize a robust program and verification by a USDA program further enhances this. We believe it's important to test every inbound delivery to assure proper storage and handling in our facility.

We plan to implement the program at other SunOpta facilities across our vertically integrated platform to the benefit of our customers.

For more information, please contact us at [grains@sunopta.com](mailto:grains@sunopta.com) or visit our website at [www.sunopta.com](http://www.sunopta.com).

**USDA PROCESS VERIFIED**

**99.1% VERIFIED NON-GMO/GE**

<http://grains@sunopta.com>

[www.sunopta.com](http://www.sunopta.com)



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