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Docket Clerk  
1400 Independence Ave. SW  
Room 2069—South  
Washington, DC 20250

June 10, 2024

**Re: National Bioengineered Food Disclosure Standard; Request for Information on Electronic and Digital Link Disclosures; AMS-FTPP-23-0019**

Dear Sir or Madam,

FMI – The Food Industry Association appreciates the opportunity to comment on the *National Bioengineered Food Disclosure Standard; Request for Information on Electronic and Digital Link Disclosures*. As the food industry association, FMI works with and on behalf of the entire industry to advance a safer, healthier, and more efficient consumer food supply chain. FMI brings together a wide range of members across the value chain — from retailers that sell to consumers, to producers that supply food and other products, as well as the wide variety of companies providing critical services — to amplify the collective work of the industry. More information about our organization is available at [www.FMI.org](http://www.FMI.org).

FMI’s membership includes both manufacturers and retailers who operate private label brands. Our members who are regulated entities under the bioengineered (BE) food disclosure rule have worked diligently to come into compliance with the rule. In our comments that follow, we provide responses to each of the questions in the RFI. Based on feedback from our member companies, including retailers who are in touch with millions of consumers every day, we believe that the current electronic and digital link disclosures, together with the on-pack phone number that provides access to the BE disclosure, are accessible to consumers and are a sufficient means to satisfy the intent of Congress in enacting the National Bioengineered Food Disclosure Standard.

**(1) What are the current challenges associated with consumers accessing information on the BE status of foods by electronic or digital link disclosure in a retail setting?**

FMI Response: We have no reason to believe that consumers are unable to access the BE status of foods by electronic or digital link disclosure in a retail setting. For instance, our members have not reported receiving consumer contacts or inquiries asking about BE status of food. As we will detail in our response to Question 2, any consumer who cannot access an



electronic or digital link for any reason can access the disclosure using the phone number on the packaging that is required by the BE Standard whenever the digital disclosure option is used.

**(2) If a regulated entity chooses to use an electronic or digital link to disclose a BE food, what additional and comparable option should AMS add to the electronic or digital link disclosure option that would be more helpful for consumers?**

FMI Response:

### Summary

The telephone number that is already required to appear on-pack when the electronic or digital link is used, fulfills the congressional mandate of providing an “additional comparable” option that provides access to the BE disclosure. As discussed further below, the on-pack phone number disclosure already goes above and beyond what is required of the statute. 97% of adults own a mobile phone, allowing the vast majority of those without internet or smartphone access to access the bioengineered food disclosure by calling the phone number.<sup>1</sup> Further, according to the Deloitte study, retail stores universally have phones available, which makes the disclosure accessible, while shopping, to the 3% without mobile phones. In contrast, adding a third means of disclosure (such as a text message) would impose significant cost and burdens in the form of an additional label change, without providing any corresponding benefit, since anyone with access to text messaging can already use the existing phone number on-pack.

Alternatively, AMS should commission an update to the Deloitte study on consumer access to digital disclosure, which was published in July 2017 and based on data collected in 2016. We believe that if AMS were to update the Deloitte study today, it would find sufficient access to the digital disclosure, in which case no “additional and comparable option” to the digital disclosure would be necessary. More details follow.

### Use of On-Pack Phone Number as “Additional and Comparable Option”

AMS should rely upon the telephone number that is currently required to appear on a product’s packaging when the digital disclosure is used, as an “additional and comparable option” meeting the statutory requirement. The district court in *Natural Grocers et al. v. Vilsack*, when issuing its opinion on whether the text message disclosure option addressed barriers to accessing the digital disclosure, did not consider the effect of the telephone number appearing *on-pack* and providing access to the disclosure. The current regulation requires that, when the digital disclosure is used on a product’s packaging, a *telephone disclosure* must also be made available on the product label. 7 C.F.R. § 66.106(a)(2). In particular, the label must bear a statement directly above or below the digital link that reads, “Scan here for more food

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<sup>1</sup>See <https://www.pewresearch.org/internet/fact-sheet/mobile/#who-owns-cellphones-and-smartphone>.

information **or call [number]**” (emphasis added).<sup>2</sup> This phone number must make the disclosure available to consumers 24 hours a day, 7 days a week, and provides the same bioengineered food disclosure that is accessible by the digital link. Notably, Congress did *not* expressly require the phone number to appear on the label.<sup>3</sup> The existing regulation requiring it to appear on the product label when the digital disclosure method is used therefore already represents an “additional and comparable” option – above and beyond what is required by the statute – that increases access to the disclosure for consumers who may not have sufficient internet or smartphone access or technological ability.

Effectively, when digital disclosure is used, there are *two* means of disclosure already available – the digital link and the phone number. The court, however, only considered consumer access to the digital link, and not the phone number. Today, an estimated 97% of individuals in the U.S. own a mobile phone. As a result, under the current regulations, consumers without internet or smartphone access can obtain the bioengineered food disclosure by calling the phone number. Moreover, even if a consumer is among the 3% of Americans who do not own a mobile phone, they can still obtain access to the disclosure while shopping by using the retailer’s telephone or a landline. In fact, the Deloitte study noted that retail stores “universally reported having a phone available” for managers to use and that managers *could* use the phones to assist consumers in accessing the disclosures while they are shopping, if requested.<sup>4</sup>

An additional requirement *other than* the on-pack phone number, such as a requirement to add a “text message” disclosure when the digital disclosure is used – for example by adding “Scan here for more food information or call [number] **or text [number]**” to the on-pack statement – would not increase consumer access beyond current rates because a consumer who has access to text messaging would also be able to call a telephone number using the existing on-pack statement. In fact, the telephone number likely provides better access than a text message because individuals without mobile phones can ask a store associate to call the number on their behalf, whereas the store landline would not have text messaging capabilities. Adding a text message disclosure – in effect a *third* means of disclosure in addition to the digital and telephone disclosure – would also impose significant costs and burdens in the form of an additional label change. This burden would be undertaken without a benefit to consumers given the current availability of the on-pack phone number. For these reasons, AMS should recognize that the existing phone number on-pack when the digital disclosure method is used, serves as the “additional and comparable option” under the statute.

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<sup>2</sup> AMS allows the following single statement to be used on product labels: “Scan here for more food information or call [1-000-000-0000].” USDA Agricultural Marketing Service, BE Frequently Asked Question – Disclosure, <https://www.ams.usda.gov/rules-regulations/be/faq/disclosure>.

<sup>3</sup> The statute provides that the USDA’s regulations must “ensure that . . . (4) the electronic or digital link disclosure also includes a telephone number that provides access to the bioengineering disclosure. . . .” 7 U.S.C. § 1639b(d)(5). Although the statute does not expressly require that the telephone number be provided directly on the packaging, the USDA’s final regulations do. Indeed, the fact that the statute required USDA to undertake a study on the availability of consumer access to *solely* a digital disclosure, not a digital disclosure plus an on-package telephone disclosure or a telephone disclosure alone, seems to be at odds with this dual requirement. Rather, it would seem that no such study would have been necessary had Congress intended that the telephone disclosure accompany the digital or electronic link directly *on the packaging*. For these reasons, we believe the regulatory requirement for a phone number to appear on-pack when the digital disclosure is selected already goes above and beyond what is required by the statute.

<sup>4</sup> DELOITTE, *Study of Electronic or Digital Link Disclosure: A Third-Party Evaluation of Challenges Impacting Access to Bioengineered Food Disclosure*, U.S. DEP’T OF AG. (July 2017), at 20, [https://www.ams.usda.gov/sites/default/files/media/USDA\\_Deloitte\\_Study\\_of\\_Electronic\\_or\\_Digital\\_Disclosure\\_20170801.pdf](https://www.ams.usda.gov/sites/default/files/media/USDA_Deloitte_Study_of_Electronic_or_Digital_Disclosure_20170801.pdf).

### Alternative Approach: Update to Deloitte Study on Consumer Access

Alternatively, AMS should commission an update to the Deloitte study on consumer access to digital disclosure, which was published in July 2017 and based on data collected in 2016. We believe that if AMS were to update the Deloitte study today, it would find sufficient access to the digital disclosure, in which case no “additional and comparable option” to the digital disclosure would be necessary.

### Placement of the “Additional and Comparable” Option

As discussed below, we recommend that AMS allow the additional and comparable option reading “Scan here for more food information or call [number]” to appear to the right or left of the digital link. The call-to-action statement reading “Scan here for more food information or call [number]”<sup>5</sup> is currently required to be placed “directly above or below” the digital link. 7 C.F.R. § 66.106(a)(2). AMS should revise the regulation to allow the statement to appear above, below, **or immediately adjacent to** the digital link. The statute merely requires the on-package language to “accompan[y]” the electronic or digital link disclosure. 7 U.S.C. § 1639b (d)(1)(A). The statute, therefore, is silent on whether the “Scan here” statement must appear above or below the digital disclosure, and AMS has legal authority to allow the information to appear to the left or right of the digital disclosure.

Making this change would have a significant economic impact and provide needed flexibility. In 2020, the Policy Navigation Group conducted a report<sup>6</sup> evaluating the economic impact of the AMS decision to limit flexibility on the placement of the electronic disclosure by requiring the “scan here” statement to appear above or below the digital code rather than immediately adjacent to it. The report concluded the absence of flexibility would impose significant financial burdens on the industry by forcing companies to make significant changes to the labels to accommodate the placement. In many instances space constraints on the label forced companies to redesign the entire back label and possibly other panels to make certain the “Scan here” statement is above or below the digital link. The report estimated the lack of flexibility would result in up to \$400 million in additional costs.

AMS did not have the benefit of assessing the economic impact of requiring the “Scan here” statement to appear above or below the digital link rather than immediately adjacent to it when it issued its regulation. Now that AMS has a better understanding of the economic impact of the placement as indicated by the report, it would be appropriate for AMS to revise the regulation. While companies that have already undergone a labeling change to add the “Scan here” statement directly above or below the digital link would not necessarily revise their labels, the flexibility would benefit companies newly adopting digital disclosure and would also allow companies undergoing a label refresh to have additional options as to where to place the “Scan here” statement.

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<sup>5</sup> AMS allows the following single statement to be used on product labels: “Scan here for more food information or call [1-000-000-0000].” USDA Agricultural Marketing Service, BE Frequently Asked Question – Disclosure, <https://www.ams.usda.gov/rules-regulations/be/faq/disclosure>.

<sup>6</sup> See supporting document submitted with comments

For these reasons, we urge AMS to revise the regulation to allow the “Scan here...” statement to appear immediately adjacent to the digital disclosure.

**(3) Provide information on current smartphone ownership among consumers, if available.**

**Context: AMS is interested in the availability of wireless internet or cellular networks. AMS has found that as of 2021, most Americans (97 percent) owned a cellphone of some kind and smartphone ownership was at 85 percent. In particular, the Pew Research Center found that 89 percent of urban adults, 84 percent of suburban adults, and 80 percent of rural adults in America own a smartphone. The Pew Research Center also found that 61 percent of individuals 65 and older own a smartphone.**

FMI Response: As reported in the Pew Research Center research cited by AMS, in 2021, smartphone ownership in the United States was estimated at 85%, and that number has grown to 90% as of September 2023.<sup>7</sup> This represents a continued increase from the 77% of Americans who owned a smartphone in 2016, per the Deloitte study. Additionally, FMI has found that 70% of shoppers use a smartphone for grocery shopping, according to Transparency Trends 2023.<sup>8</sup>

**(4) Provide information on the availability of broadband in a retail setting, if available.**

**This could include broadband that is offered directly to consumers, or the accessibility to other private networks while in a retail setting.**

FMI Response: According to FMI’s survey *The Food Retailing Industry Speaks 2023*, 98% of food retailer stores are Wi-Fi enabled.<sup>9</sup> As discussed above, the telephone number that is currently required to appear on product packaging when the digital disclosure is used would make the bioengineered disclosure available if Wi-Fi is unavailable for any reason.

We also note that the gap in Wi-Fi access specifically identified in the Deloitte study was focused on rural regions of the country and smaller or rural retail stores, but since 2018, the USDA has invested \$5.13 billion to grow internet access for rural communities through the ReConnect Program.<sup>10</sup> As a result, the gap in internet access between urban and rural regions has shrunk in the eight years since results were gathered for the Deloitte study.<sup>11</sup>

**(5) Provide current information on the consumer usage of BE or other electronic or digital link disclosures in a retail setting. Context: AMS is trying to determine if accessibility to information through electronic and digital disclosure in retail settings is common;**

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<sup>7</sup> See <https://www.pewresearch.org/internet/fact-sheet/mobile/#who-owns-cellphones-and-smartphone>.

<sup>8</sup> FMI – The Food Industry Association and NielsenIQ, *Transparency Trends 2023: Food Shoppers Increasingly Prioritize Information*, 2023.

<sup>9</sup> FMI – The Food Industry Association, *The Food Retailing Industry Speaks*, 2023.

<sup>10</sup> See U.S. DEP’T OF AG., ReConnect Loan and Grant Program, <https://www.usda.gov/reconnect>.

<sup>11</sup> The data supports this. Research from the Pew Research Center shows that rural access to home broadband internet was approximately 61% in 2016—the year the Deloitte study collected data. But this number has since risen to 73% in 2021.

**responses can include use in restaurants or related retail sectors, in addition to grocery.**

FMI Response: As discussed above, current smartphone ownership and Wi-Fi access in 98% of retail settings would enable the majority of consumers to access an electronic or digital disclosure in a retail setting, and the telephone number option would enable the remaining 2% to access the disclosure using another means.

The current digital disclosure standard requires the bioengineered disclosure to be available on the “first screen to appear” after the link is accessed.<sup>12</sup> In practice, AMS has interpreted this to require the disclosure to appear directly on the SmartLabel landing page. As a result, we are unable to distinguish how many users view the bioengineered disclosure compared to users accessing the SmartLabel page to view other product information. If AMS were to permit the BE food disclosure to appear on a separate tab that is accessible from the SmartLabel landing page (e.g., a tab labeled “Bioengineered Food Information”), rather than on the landing page itself, we would be able to provide more precise information on consumer usage of the BE disclosure through SmartLabel.

**(6) Explain any advantages and benefits to using the electronic or digital link disclosure option.**

FMI Response: The digital disclosure option provides significant benefits to both consumers and industry alike. The digital link on-pack allows consumers to quickly access a website that provides more mandatory and voluntary information than could ever fit on the product package including ingredient definitions and sourcing information, links to allergy prevention and management resources, health and safety instructions, and sustainability attributes. Digital disclosures are able to provide the consumer with the BE disclosure as well as supplemental information that may be important to them. SmartLabel is the primary means for digital disclosure used on food packaging today, though it is certainly not the only option. SmartLabel displays supplemental information about products in a standardized format. Therefore, a consumer familiar with SmartLabel would know exactly where to look for a BE disclosure or other information they are interested in finding.

As of September 2023, around 90% of Americans own a smartphone.<sup>13</sup> Our members have indicated that consumers are increasingly looking for information that goes beyond the information provided on the package, as seen in analytical data from SmartLabel pages. FMI’s 2023 Transparency Trends report found that 80% of shoppers said they would be somewhat or very likely to seek more product details by making use of a QR code, website app, or other tool.<sup>14</sup> Digital disclosure tools, therefore, are a way to provide consumers access to detailed information about the products they purchase.

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<sup>12</sup> 7 CFR 66.106

<sup>13</sup> See <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

<sup>14</sup> FMI – The Food Industry Association and NielsenIQ, *Transparency Trends 2023: Food Shoppers Increasingly Prioritize Information*, 2023.

Importantly, this information can be modified and updated by the manufacturer or brand owner distributing the food, without having to go through multiple parties and delays in updating the information. This allows consumers to have access to near real-time updates about the products they are purchasing or using. The use of digital disclosure provides agility when there are changes to the BE status of an ingredient and/or the final product. For instance, if a food product now requires a bioengineering disclosure or the company is no longer sourcing a bioengineered ingredient, the digital disclosure option allows for the company to more efficiently and quickly update the product's information on the website. By not requiring a physical label change, digital disclosure saves significant time and resources while providing the ancillary environmental benefit of avoiding printing new labels (and disposing of existing labels) each time a change is required or desired.

Digital disclosure is not just a tool for the specific products that currently require a bioengineered food disclosure. Rather, consumer brands typically adopt digital disclosure programs such as SmartLabel across all products lines and portfolios. This allows for products compatible with SmartLabel, but which are not currently subject to mandatory disclosure requirements, to be immediately updated if and when future disclosure requirements are enacted.

Digital disclosure is also advantageous because it can be used to comply with future "right to know" disclosure laws. Indeed, several states have considered and enacted disclosure laws that permit digital disclosure. One example is the California Cleaning Product Right to Know Act of 2017, which mandates disclosure of certain chemicals contained in cleaning products, and allows for this disclosure by digital means. See Cal. Health & Safety Code § 108954 et seq. This ability for companies to quickly comply with newly enacted laws without physical labeling changes, and for consumers to receive all the relevant information in one place in near real-time, provides a clear benefit to all marketplace participants.

In sum, digital disclosure is advantageous because it allows consumers to have access to detailed information about the products they purchase, which can be immediately updated by the company without changing the product label, avoiding the time, cost, and environmental waste of labeling changes.

**(7) Provide any information available on the percentage of usage for each of the four current disclosure options. In addition, provide information on how many small businesses use each of the four disclosure options. Context: AMS evaluates the costs that rulemaking would impose on regulated entities according to each type of disclosure option and is seeking additional data regarding how many products in the marketplace use each of the four currently available options.**

FMI Response: The statute mandates that companies must be able to select among the three disclosure options provided by Congress (digital or electronic, text statement, and symbol).<sup>15</sup>

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<sup>15</sup> 7 U.S.C. § 1639b(b)(2)(D).

Flexibility of choice in disclosure options allows each company to determine which type of disclosure works best for their individual products and consumer bases. FMI does not track the specific breakdown of disclosure option usage amongst our member companies. Based on member feedback among both retailers with private brands and product manufacturers, the on-package text option (e.g., “Bioengineered food” or “Contains a bioengineered food ingredient”) or the digital disclosure option are most often used.

Please see our response to Question 8 for more information about the cost of packaging updates. Companies of all sizes would be affected by a change in disclosure requirements, especially if that change were required on a tight timeline.

**(8) How long does it take on average to update label art, print new labels, and deploy new labels to production lines? How frequently are labels reordered and label inventory updated? Is there any standard cycle for updating retail product labels? How frequently is product inventory updated at retail? What is the preferred optimum compliance period for incorporating new mandatory disclosure information into products for retail?**

FMI Response:

- The process of updating label specifications, reviewing and approving graphics and printing and delivering packaging to product sites can vary based on company size, product and packaging type, and frequency of production and volume of the item produced. Our members have estimated that it can take up to 3 years to complete a mandatory change across the portfolio without significant packaging waste and financial cost. In some instances, a single packaging change could be executed in 6 months, but this should be considered a minimum, does not apply to all companies, and labeling changes affecting an entire product portfolio would require years rather than months.
- Graphics and labels are generally not altered unless there is a trigger (graphic redesign, reformulation requiring new label information etc.). Without a trigger to change, the same graphics continue to get reprinted as needed to replenish inventory at manufacturing sites. The quantities of packaging printed varies based on a variety of factors, including company size, how soon graphics are expected to be updated (if this information is known), the expected sales of the product, and others. Labels are reordered in line with production schedules and consumer demand for products.
- Given the cost and timeline to update graphics and the number of stock keeping units (SKUs) potentially impacted by a change to the digital disclosure method, and based on our learnings from FDA’s Nutrition Label Reform in 2016 and initial Bioengineered Food Disclosure requirements, a compliance timeline of 3-4 years is optimal to allow ample time to update all graphics and potentially harmonize with other planned changes to graphics. If a significant number of products are impacted, companies would not have the resources to make all updates simultaneously in a shorter period of time.



Additionally, many manufacturers and retailers may utilize the same design firms and printing companies, and when broad labeling changes impact the entire industry, they can put a strain on those shared resources and create delays in implementation. Three to four years would help provide time to coordinate with external resources and plan a label conversion for all affected products.

- If a modification is made to the current regulation, it will be important to have an appropriate compliance period as well as preemption protection for the current requirements ahead of any new changes (i.e., an explicit statement that both the current requirements and the updated requirements (once finalized) are “mandatory disclosure requirements” under the amended Act (Public Law 114-216) such that any state or local laws not identical to either of those requirements would be preempted through the compliance period. Starting on the compliance date, the “new” disclosure requirements would have preemptive effect over any differing state or local laws.

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We appreciate AMS’s work to seek stakeholder input on the electronic or digital link disclosure method and look forward to working collaboratively with the agency on this issue.

Please do not hesitate to contact us with any questions.

Sincerely,



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