



## FREQUENTLY ASKED QUESTIONS

Updated September 28, 2015

### Implementation of Vermont's Genetically Engineered Food Labeling Law

To address questions companies have in regards to the Vermont labeling law, GMA has composed a list of frequently asked questions with answers for your reference. We do recommend that you read the law and the implementing Rule. The Vermont AG's office has a dedicated [webpage](#) for the GE labeling law where you can access regulatory documents and sign up for email alerts when they issue new items related to the law. The full text of Vermont's mandatory GE labeling law can be found [here](#). The State's rulemaking documents to implement the law can be found [here](#), and its Annotated Rule, released on September 23, is available [here](#).

This document is NOT legal advice. It merely offers information on the Vermont law and the final rule issued by the state. Additionally, as is noted in certain responses, GMA does not have all necessary information to answer some questions – guidance is needed from the State of Vermont. In the absence of guidance, it is up to each individual company to interpret Vermont's Rule. Each company needs to work internally with its own counsel and experts to determine next steps. **It is up to each company to unilaterally decide its own course of action.**

#### **1) *Why is GMA opposed to Vermont's mandatory labeling law?***

Putting aside the question of the law's constitutionality, GMA strongly believes that mandatory statements on labels should be reserved for declarations regarding health, safety, and nutritional information; in other words, information that the Food and Drug Administration (FDA) deems material. FDA does not consider a statement on a label regarding the presence or absence of genetically engineered (GE) ingredients to be a material statement. Thus, it should be left as a voluntary claim made at a manufacturer's discretion.

#### **2) *When does Vermont's law take effect?***

The effective date is July 1, 2016. However, there is a six-month safe harbor period from July 1, 2016 through January 1, 2017. During that time, the state will presume that foods *non-compliant* with the labeling law were packaged and distributed before the law's effective date. Food produced before July 1, 2016 but distributed *after* that date will not receive this presumption. Guidance from the state issued September 23, 2015 defines "distributed" as "sold or transported to the retailer, whether or not that food is offered for retail sale immediately upon receipt of that food by the retailer."

#### **3) *What are the penalties for noncompliance with the Vermont law?***

Manufacturers and retailers with private label brands may be fined up to \$1,000 per day per store per mislabeled SKU.

**4) Can GMA members all agree not to sell in Vermont?**

**NO.** As stated at the top of this page, members must decide on their own what to do in Vermont. To act otherwise implicates collusive behavior and violates federal and state antitrust laws. GMA cannot stress this enough: this is an individual business decision, and to confer with competitors regarding this decision could be interpreted as a violation of antitrust laws.

**5) Who enforces the law?**

The Vermont Attorney General's Office is tasked with enforcing the law, and private suits by individuals to enforce the law are allowed. The Annotated Rule released on September 23, 2015 states that its rules addressing the GE labeling law are intended to govern both State enforcement actions and civil suits filed by private citizens.

**6) What products are exempted from the law?**

The following items are exempted from the law:

**-Alcoholic beverages** – The State has clarified that Vermont's Title 7, addressing alcoholic beverages, does not govern beverages containing less than one percent alcohol content by volume, so such beverages are not exempt from the GE labeling law.

**-Animal products** – Food under this exemption include all animal products (including processed dairy products), unless the product requires labeling because of an additional ingredient (e.g., ice cream produced with GE sugar).

**-Foods bearing USDA-approved labels** – This exemption applies to products subject to USDA approval, whether that be generic approval, sketch/special statement/claim, or temporary claim approval.

**-Foods certified as not being produced with genetic engineering** – This subsection permits sellers to rely on the sworn statement of the person from whom they purchased the food.

**-Food for immediate consumption** – The Rule states that if more than 50 percent of the establishment's total sales of food in the previous year is food taxable (such as restaurants), then it is exempt. However, for food that is capable of being sold as either a taxable meal or a grocery item based on the quantity bought, a retailer must label the food under this law (unless the retailer limits the amount a consumer can purchase to ensure the food will be considered a taxable meal).

**-Food verified by a qualifying organization** – The State will list qualifying organizations on its website.

**-Foods with minimal GE content** – The State's Annotated Rule has clarified this: if the aggregate weight of the GE materials in the food is no more than 0.9 percent of total weight of food minus added water and salt, then it is exempted from the law. Cooked and baked foods need to be weighed before either cooking or baking.

**-Medical food.**

**-Processing aids** – The State's Annotated Rule indicates that this exemption "could" include rennet used in the production of cheese, or de-foaming agents used in the production of maple syrup.

**7) Are there records that manufacturers must retain?**

Yes. The State's Annotated Rule of September 23, 2015 provides more information on the types of records that must be maintained. The rules require manufacturers to retain records "sufficient to demonstrate their compliance with this rule" for three years. That record requirement means a person has to maintain documents demonstrating:

- a) the product in question was properly labeled when offered to retailers – documents should address how products were labeled when offered for retail sale;
- b) that an exemption in the law applies to a specific product or ingredient (please see question 21 for the list of exemptions);
- c) a food is not knowingly and intentionally produced via genetic engineering – documents should be retained showing that i) there is no commercially viable variety of the food or ingredient that is produced via genetic engineering, and ii) there was no knowing or intentional commingling of that food with food produced with genetic engineering.

The State has provided a form – the sworn statement - that can be completed to certify that food has not been produced with genetic engineering and has been segregated. The form can be found on the final page of the Annotated Rule.

**8) *Must a company that supplies ingredients to a food manufacturer provide a sworn statement regarding the GE status of an ingredient?***

The law requires sellers (i.e., manufacturers purchasing products from their suppliers or retailers purchasing products from manufacturers) to obtain sworn statements from the parties they purchase food from confirming non-GE ingredients are in those products *if they wish to certify that a product does not contain GE ingredients*. If a sworn statement is not provided, then that seller cannot claim the non-GE exemption.

As clarified in the Annotated Rule, the sworn statement can be incorporated into another document, e.g., an invoice, so long as they are signed and include the required affirmations. The sworn statement is valid for the food referenced. The state recommends listing the lot numbers or delivery dates, or otherwise clearly identifying the products the statement is intended to cover.

**9) *What if companies source ingredients from other countries?***

The State clarified in its Annotated Rule that “For imported products, the manufacturer may rely on the sworn statement of the person from whom the product is purchased.”

**10) *What does the state consider a proper “label” for foods containing GMO ingredients?***

Vermont’s final rule defines a “label” as a “display of written, printed, or graphic material on a packaged processed food or packaged raw agricultural commodity or any such material affixed to any shelf or bin in which an unpackaged raw agricultural commodity or unpackaged processed food is displayed for retail sale.” The State clarified in its Annotated Rule that the use of stickers, stamps, or additional printing on existing packaging is permitted so long as all disclosure requirements are met.

Please note that the State indicated in its Annotated Rule at 121.01 (13)(d) that if a person chooses to apply a sticker to a product in order to bring the product into compliance, that person (e.g., a retailer) may be considered a “manufacturer” for the purposes of the rule, including the penalty section.

**11) *How must the label look and where does it go?***

The Rule details what the label should say, how it should look, and where it should be placed. For the particulars, please see Section CP 121.02 of the Annotated Rule. In short, the label must be “easily found” and “easily read.”

**12) How do manufacturers label small packages where the surface area available is such that the required disclosure could not be made legibly (i.e., single pack of gum or package of mints)?**

The State has indicated that if the disclosure does not fit on the information panel because the packaging is too small, a manufacturer can put the disclosure on another panel on the package so long as the disclosure meets the “easily read” and “easily found” standard.

**13) How does the State define “packaged?”**

“Packaged” means an item offered for retail sale is fully or partially contained or wrapped in material and upon which a manufacturer is identified. “Partially contained or wrapped” means more than one-third of the food is covered by packaging material. According to State guidance, when a manufacturer chooses to include its name on the packaging of a raw agricultural commodity, the manufacturer is responsible for labeling in accordance with the Vermont law IF there is sufficient space for the required disclosure.

**14) How do companies determine whether to label a product “produced,” “partially produced with,” or “may be produced” with genetically modified organisms? Can’t manufacturers just default to “may be produced”?**

The Rule states that “may be” can be used to modify “produced with genetic engineering” only when the food’s manufacturer does not know, “after reasonable inquiry,” whether the food is, or contains a component that is, produced with genetic engineering. This means that if a manufacturer cannot reasonably guarantee whether the contents of a given package contain GMOs because of varying availability of an ingredient, then a manufacturer should use the “may be” description. The State defines a “reasonable inquiry” as an “active attempt” to find out whether or not a food is produced via genetic engineering. At a minimum, the party responsible for labeling a product must inquire from the person from whom they purchased the food whether or not it was made using genetic engineering.

“Partially produced” is to be used for food containing less than 75 percent of GE material by weight. Food is to be weighed exclusive of added water and salt. The amount of GE material must be rounded up to the nearest whole number. Baked or cooked foods should be weighed prior to the baking or cooking.

**15) How should companies address “natural” claims on labels given the Vermont trial court’s favorable response on this issue?**

The Vermont law bans the use of the specific terms “natural,” “naturally,” and “nature” on labels of food containing GE ingredients. The state has clarified in its Annotated Rule that this also includes any advertising at the physical retail premises and includes in-store advertisements. This is regardless of the type of media (printed circulars, window signs, billboards, television commercials, or other digital displays).

**16) What about the labeling of food sold in packs from club retailers (.e.g., Costco) or multi-product displays or food that has been repackaged?**

The State has determined that nothing in the Vermont law exempts food sold in bulk packaging from the labeling requirement. While nothing in the State guidance specifically addresses multi-product displays or food that has been repackaged, it should be presumed that those items will not be exempt. GMA encourages companies to work with counsel on this issue.

**17) Will GMA provide guidance on how to treat specific products/ingredients as member companies assess whether or not their product(s) need to carry the GMO disclosure?**

GMA will not be providing guidance on individual issues of labeling. GMA strongly urges companies to review the law and rules and work with their legal counsel to determine when the disclosure is required.

**18) Is the Food Marketing Institute (FMI) working with its own members to ensure retailer cooperation and engagement when it comes to compliance?**

Yes – FMI is working with its members to assist in ensuring compliance.

**19) Are there any rules addressing items returned to retailers that are noncompliant with the labeling law? Who absorbs the cost of a return?**

There is no guidance from the State on this issue.

**20) Is there any regulation addressing the removal or disposal of noncompliant products and who absorbs the cost?**

There is no regulation or guidance from the State on this issue.

**21) Who will be inspecting products to ensure compliance with the law? Where will inspections take place – at retailers, a distribution center, as a product is in transit?**

While there is no guidance from the State on this issue, GMA anticipates that the state will rely on consumer complaints of non-compliance for products found on store shelves. Additionally, the State has clarified that private parties may bring actions to enforce the law. Because there is no violation until the product is “offered for retail sale” to consumers in Vermont, it is highly unlikely that there will be any investigation further upstream, as there is no violation until it is offered for sale at the retail establishment.

**22) As manufacturers remove noncompliant items from shelves, can these items be donated to a local food bank or similar organization?**

GMA plans to inquire with the State on donations of product that is not compliant with the Law.

**23) How does a manufacturer prove that its food is certified as not being produced with GE ingredients and therefore, can qualify under that exemption?**

Manufacturers must have a sworn statement from the party that sold them food stating that the non-GE food was not knowingly or intentionally produced with GE ingredients nor commingled with products that were, and that the products were segregated.

**24) Are online sales subject to the law?**

The Annotated Rule clarify that online-only retail purchases are exempt from the law.

**25) What qualifies as a “retail premises?” Are vending machines subject to the law?**

A “retail premises” is a physical location in the State of Vermont. This includes vending machines, retail outlets housed in a manufacturing facility, farm stands, or mobile vendor kiosks. The state further clarified in its Annotated Rule that bake sales and other informal and irregular retail sales of food are excluded from the labeling requirements of the law.

**26) Are food service sales to restaurants, cafeterias, etc., subject to the law?**

GMA does not believe food service sales to restaurants, cafeterias and similar businesses are subject to the law because they are not for sale to a consumer, and are for “resale.” See CP 121.01 (21), definition of “retail sale”.

**27) How will Vermont address food that is labeled “not intended for retail sale in Vermont” but still appears on a store shelf despite the manufacturer’s best efforts and intentions?**

The State has not issued any guidance on this question.

**28) What is the likelihood of the federal bill superseding the Vermont law?**

Federal legislation ([H.R. 1599](#)) was passed by the U.S. House of Representatives on July 23, 2015 and is now awaiting action in the U.S. Senate. This bill will establish a national voluntary GE ingredient labeling program. The House-passed version of the federal legislation, if enacted and signed into law, will preempt the Vermont law and similar state laws, rendering them unenforceable. It also will block states from passing laws that conflict with federal statute – meaning that states cannot pass laws requiring the labeling of food with GE ingredients since the federal law does not allow for such an option.

**29) Where can I find more information?**

As noted at the top of these FAQs, the Vermont AG’s office has a dedicated [webpage](#) for the GE labeling law where you can access regulatory documents and sign up for email alerts when they issue new items related to the law. The full text of Vermont’s mandatory GE labeling law can be found [here](#). The State’s rulemaking documents to implement the law can be found [here](#).

This document will be updated to convey any additional guidance released by the state, as well as to reflect additional questions and answers that members ask.