

ALERT

UPDATE: USDA Bioengineered Food Disclosure Rulemaking Timeline Takes Shape

June 5, 2026

**This alert updates Wiley's November 11, 2025 client alert, Ninth Circuit Opens USDA's Bioengineered Food Disclosure Requirements, regarding the October 31, 2025 decision in Natural Grocers v. Rollins.*

This update provides information about party filings with the district court and parallel rulemaking efforts by the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS), which provide potential insight into the timeline and scope of changes to the National Bioengineered Food Disclosure Standard (BE Rule). Parties have recently submitted supplemental briefs to the U.S. District Court for the Northern District of California addressing whether and how to vacate provisions of the BE Rule that the courts found unlawful. Plaintiffs' reply brief is due June 15, 2026, after which the district court will begin considering the parties' briefed proposals. While the current federal BE disclosure framework remains in effect, AMS has indicated that it plans to propose and finalize a rule related to what constitutes a bioengineered food subject to the disclosure rules this year, with additional rulemaking on disclosure methods anticipated in 2027.

Non-Detectability Exclusion in the BE Food Definition

The U.S. Court of Appeals for the Ninth Circuit held that AMS erred by excluding foods derived from genetically modified ingredients from the definition of "bioengineered food" that are processed to make the genetically modified material undetectable. The court found this approach to rest on the flawed premise that a food does not "contain" genetically modified material simply because it is undetectable in the product. The court additionally stated that AMS has the authority under a separate provision of the National

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Bioengineered Food Disclosure Standard amendments to the Agricultural Marketing Act to set a threshold amount of bioengineered substance necessary for a food to qualify as a “bioengineered food”. The Ninth Circuit directed the district court to remand the relevant regulations to AMS and determine whether and how the current regulations should be vacated.

In their brief, plaintiffs ask the district court to prospectively vacate the non-detectability exclusion from the bioengineered food definition to take effect January 1, 2028. They contend that vacatur is warranted as the existing exemption creates a disclosure gap for refined foods, undermining the statutes’ transparency objectives.

The government’s brief does not oppose plaintiffs’ requested effective date for prospective vacatur, stating that AMS anticipates publishing a proposed rule this summer and issuing a final rule by the end of 2026, with an effective date of January 1, 2028. In discussing the vacatur issue, the government’s brief states that “AMS’s error in not relying on the correct statutory authority for the detectability standard contained in the definitional regulatory provision is ... not serious in magnitude” and that AMS’s error was “minor and akin to a ‘technical’ error, “such that the agency ‘could adopt the same rule on remand.””

Electronic/Digital Link and Text-Message Disclosure

The Ninth Circuit also ordered the district court to obtain supplemental briefing on implementation of prospective vacatur after holding that the district court erred by declining to vacate provisions of the BE Rule that allow electronic/digital link and text message disclosures to identify a food as bioengineered. Plaintiffs seek prospective vacatur of both disclosure options effective January 1, 2028, arguing that this timeline is consistent with industry practice for implementing labeling changes and aligns with USDA’s and FDA’s uniform compliance date for final labeling rules issued in 2025 and 2026.

The government’s brief advocates for prospective vacatur of disclosure methods with a later effective date of January 1, 2029. According to the brief, AMS anticipates publishing a proposed rule by spring 2027 and a final rule by fall 2027. The government states that the agency is conducting an additional research study on consumer accessibility to bioengineered food disclosures through electronic or digital methods to inform this rulemaking. The study is expected to conclude this winter. The government further argues that a staggered approach to implementing vacatur is necessary because changes to the definition of “bioengineered food” must precede updates to disclosure methods so that regulated entities can determine which products are subject to the BE Rule before revising labels.

What Does This Mean for Food Manufacturers?

While these filings provide some information into future actions regarding new BE rules, significant uncertainty remains. Importantly, the current federal BE disclosure framework remains in place while the district court considers the parties’ briefs. Manufacturers should continue monitoring both the litigation and rulemaking processes and be prepared to comment on the proposed rules if desired.

Wiley will continue to monitor developments in the remand proceedings and USDA rulemaking related to the BE Rule. For more information on how these changes could affect your business, please contact the authors of this alert.

Original Alert:

Ninth Circuit Upends USDA's Bioengineered Food Disclosure Requirements

In *Natural Grocers v. Rollins*, the U.S. Court of Appeals for the Ninth Circuit significantly upended certain parts of the U.S. Department of Agriculture's (USDA) National Bioengineered Food Disclosure Standard (BE Rule).

The 2018 BE Rule implemented the 2016 National Bioengineered Food Disclosure Standard amendments to the Agricultural Marketing Act, which require mandatory consumer-facing disclosure with respect to bioengineered food.

In an October 31, 2025 3-0 opinion, the court held that:

- The USDA BE Rule cannot exclude genetically modified food or food ingredients, subject to a refining process (e.g., highly refined foods) validated to render modified genetic material undetectable, from the definition of "bioengineered food" because of the USDA's legal error in determining that such refined foods do not "contain" modified genetic material.
- While the court rejected the BE Rule's existing "bioengineered food" definition as to the exclusion of refined foods, the opinion states that the USDA has the authority under a separate provision of the Act to set a threshold amount of genetically modified material necessary for a food to qualify as a "bioengineered food."
- The BE Rule's requirement to use the term "bioengineered food" in disclosures, rather than more familiar terms such as "genetically engineered" or "GMO," is lawful.
- The district court erred in not vacating aspects of the rule allowing electronic/digital link and text message disclosures to identify a food as bioengineered where the court found those methods did not provide consumers with meaningful access to the disclosure.

The Ninth Circuit returned the case to the district court, directing it to remand certain issues back to the USDA and to consider any appropriate steps to vacate or consider vacating portions of the BE Rule in accordance with the Ninth Circuit's opinion.

WHAT DOES THIS MEAN FOR FOOD MANUFACTURERS? The court's decision sends the case back to the district court to both seek arguments from the parties about the appropriate way to vacate certain sections of the BE Rule and to require the USDA to reconsider the regulatory definition of the phrase "bioengineered food."

For now, there is uncertainty about the methods, besides the labeled text or symbol options in the current BE Rule, that food manufacturers will be able to use to disclose that their products contain bioengineered material and what definition of “bioengineered food” will be in place until the amended BE Rule is in effect. While this will not be sorted out for a while, nothing will be required to change until the district court issues a ruling.

USDA will have to issue a new regulatory definition for “bioengineered food.” The Ninth Circuit concluded that USDA has authority to set a threshold for relevant amounts of a bioengineered substance that would determine if a substance is a “bioengineered food” subject to the mandatory disclosure requirements under Section 293(b)(2)(B) of the Act. While USDA may choose to explore this option as a way to potentially move forward, the court’s opinion does not appear to limit USDA from considering other potential options.

USDA will also have to amend the BE Rule regarding allowable methods for manufacturers to disclose that a food is bioengineered. As described more fully below, USDA is already working on a new rule on this issue.

BACKGROUND: The plaintiffs are a group of grocery retailers and public interest organizations challenging the BE Rule requirements. Three producer groups, the United States Beet Sugar Association, the American Sugarbeet Growers Association, and the American Farm Bureau Federation, intervened as additional defendants.

Plaintiffs asserted claims under the Administrative Procedure Act, arguing that the following provisions of the BE Rule were arbitrary and capricious and contrary to law:

1. Excluding from the definition of “bioengineered foods” those foods that include genetically modified ingredients but are so highly processed that the modified genetic material is “not detectable” in the final food product;
2. Mandatory use of the term “bioengineered” in required disclosures rather than the more familiar terms such as “genetically engineered” or “genetically modified organism (GMO)”;
3. Allowance of QR codes and text messages to be adequate forms of disclosure that a food is bioengineered or contains bioengineered ingredients instead of disclosure on the food package with statements or symbols.

Undetected Bioengineered Material Exemption

The Ninth Circuit concluded that USDA acted unlawfully in adopting a definition that exempted foods made from bioengineered ingredients from the disclosure standards if the modified genetic material is “undetectable” in the final food product. Under the current BE Rule, if the manufacturer can demonstrate “that the food has been subjected to a refinement process” that made the genetically modified material undetectable or has testing to “confirm the absence of modified genetic material,” in the final product, the food is exempt from disclosure.

The panel rejected the USDA's conclusion that the non-detectability of genetically modified material in a final food product was legally equivalent to a finding that the food *does not contain* bioengineered material. The court noted that different detection methods vary in their "limits of detection," so the absence of modified genetic material based upon any particular method or test cannot establish that the food does not "contain" bioengineered materials. Since the regulations fail to define a "sufficiently sensitive detection method," the exclusion for foods with undetectable levels of genetically modified materials could not be upheld.

Although the exclusion for refined foods was found to be unlawful, the Ninth Circuit rejected plaintiffs' assertion that the USDA lacks any authority to establish threshold levels for the amount of bioengineered materials that may be present in food for it to be subject to the disclosure requirements. The court found that, under a separate provision of the Act (Section 293(b)(2)(B)), Congress explicitly granted USDA the authority to determine "the amounts of a bioengineered substance that may be present in food ... in order for the food to be a bioengineered food." This leaves open the possibility of USDA adopting a threshold amount of bioengineered substance that may be present in the food to subject it to the disclosure requirements.

The Ninth Circuit reversed the district court's summary judgment decision to defendants on this claim and remanded to the district court to grant summary judgment to the plaintiffs, remand the relevant regulations to the USDA for further consideration, and determine if, after receiving input from the parties, any parts of the BE Rule should be vacated.

Use of the Term "Bioengineered"

The Ninth Circuit rejected plaintiffs' assertion that USDA regulations mandating use of the term "bioengineered" in disclosures, rather than the more familiar terms such as "genetically engineered" or "GMO," was arbitrary and capricious. Plaintiffs argued that use of these well-known alternatives would increase consumer access to bioengineering disclosures in accordance with legislative intent to create uniform and robust standards of disclosure. The Ninth Circuit found that Congress authorized USDA to establish disclosure standards using the term "bioengineered" or "any similar term, as determined by [USDA]," which could conceivably include GMO or genetically engineered. However, the decision to adopt alternative terms was ultimately left for USDA, and it decided to require use of the term "bioengineered" to "ensure disclosure consistency and minimize marketplace confusion." For several reasons, including the fact that "bioengineered" is a narrower term than GMO and genetically engineered, the Ninth Circuit affirmed the district court's grant of summary judgment for USDA, finding that USDA's decision was reasonable and within the agency's discretion.

Digital Methods of Disclosure

The Ninth Circuit vacated provisions of the BE Rule allowing electronic and text message disclosures, as these methods were shown to not provide consumers with meaningful access to the disclosure. While the district court originally found these provisions to be unlawful, it did not vacate the regulations due to the disruption it would cause to the food industry. The Ninth Circuit acknowledged that vacatur would cause disruptions but concluded that the disruptive concern could be "fully addressed by ordering only a prospective vacatur of the

two challenged provisions.”

The Ninth Circuit remanded this claim to the district court with instructions to prospectively vacate the regulations associated with electronic and text message disclosures – 7 C.F.R. §§ 66.106 and 66.108 – after receiving input from the parties. While we do not know how the prospective vacatur will be implemented, the Ninth Circuit provided examples of appropriate remedies including delaying the effective date of vacatur or establishing a timeline for selling already-labeled products. USDA has been in the process of amending the electronic and text message disclosure regulations since the district court initially found them to be unlawful. The agency issued a request for information in April 2024 for public input on amendments to the electronic disclosure options. The proposed rule is expected to be published in December 2025, which may provide clarity on USDA’s current thinking on the methods of disclosure available to food manufacturers to be in compliance with the law.

Wiley will continue to provide ongoing analysis regarding regulatory activities related to the BE Rule. We have a team of experienced, cross-disciplinary attorneys who are prepared to address client issues arising from this ruling. Please reach out to the authors of this alert for additional information.