Testimony of Scott Faber

Senior Vice President
Environmental Working Group

Before the Subcommittee on Health

Of the House Committee on Energy and Commerce

on

"Examining FDA's Role in the
Regulation of Genetically Modified Food Ingredients"

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Thank you for the opportunity to testify.

My name is Scott Faber and I am Senior Vice President of Government Affairs for the Environmental Working Group. Today, I am testifying on behalf of Just Label It, a coalition of more than 700 businesses and organizations dedicated to mandatory GMO labeling.

Consumers simply want to know what is in the food they are buying and how it was produced.

Because our food choices dramatically shape our lives, unprecedented consumer interest in food is a trend that should be welcomed, not frustrated. Consumers are not merely interested in nutrition and health. They are also interested in how our food choices impact the treatment of animals, the fate of food and farm workers, and the impacts of agriculture on the environment.

This interest extends to whether or not our food contains genetically modified ingredients.[1] Consumer surveys routinely show that more than 90 percent of Americans -- regardless of age, income, gender or even party affiliation -- want to know whether the ingredients in their food have been genetically modified.[2] More than 1.4 million Americans have joined a formal petition to the Food and Drug Administration to assert this right.[3] Over the past two years, state legislators in 30 states introduced more than 70 bills to require GMO labeling.

Although the right to know what's in our food is a value held by all Americans, accurate food labeling is not simply a matter of consumer interest. Accurate food labeling allows us to use our buying power to shape our lives and the world around us, enhances our trust in food products, and helps reduce confusion in the marketplace.[4]

Let me be clear: we are not seeking a warning label. Rather, we are asking for a modest disclosure on the back of the package that simply conveys factual information. More than 70 percent of packaged foods contain genetically modified ingredients, including commonly used oils, flours, proteins, sweeteners, and

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[1] NATURAL MARKETING INST. (NMI), 2014 GMO CONSUMER INSIGHT REPORT 28 (2014).
[2] *See, e.g.*, The Mellman Group, Inc., *Support for Mandatory Labeling of Genetically Engineered Foods Is Nearly Unanimous*, JUSTLABELIT.ORG (Mar. 22, 2012), http://justlabelit.org/wp-content/uploads/2012/01/Mellman-Survey-Results.pdf.
[3] *See Petition Seeking Mandatory Labeling for Genetically Engineered Foods*, JUSTLABELIT.ORG, http://justlabelit.org/wp-content/uploads/2011/09/gelabelingpetition.pdf.
[4] *See, e.g.*, The Mellman Group, Inc., *Support for Mandatory Labeling of Genetically Engineered Foods Is Nearly Unanimous*, JUSTLABELIT.ORG (Mar. 22, 2012), http://justlabelit.org/wp-content/uploads/2012/01/Mellman-Survey-Results.pdf.
[3] *See Petition Seeking Mandatory Labeling for Genetically Engineered Foods*, JUSTLABELIT.ORG, http://justlabelit.org/wp-content/uploads/2011/09/gelabelingpetition.pdf.
[4] NATURAL MARKETING INST, *supra* note 1, at 4 (More than half of consumers are looking for foods that are "natural," and that consumer interest in "natural" claims is exceeded only by consumer interest in food featuring "local" claims)

preservatives.[5] But, the widespread use of misleading claims like "natural" have led many consumers to believe "natural" foods are GMO-free.[6]

A recent survey by NMI found that 58 percent of respondents believed that "natural" foods are GMO-free.[7] A similar survey for by Consumer Reports' found that 64 percent of respondents believed that "natural" foods are GMO-free.[8] Currently, FDA policy does not explicitly prohibit the use of genetically modified ingredients in foods labeled as "natural." Many so-called "natural products" recently tested by Consumer Reports contained GMOs.[9]

A modest disclosure on the back of food packages will not only give consumers basic information about what's in their food and how it was produced but will also cure the consumer confusion caused by the widespread use of misleading claims like "natural."

The FDA has the authority to make such a disclosure mandatory and has done so in the past.[10] Sec. 403 (a) of the Food, Drug and Cosmetics Act prohibits the "misbranding" of food, including food labeling that "is false or misleading in any

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[5] *See* http://www.centerforfoodsafety.org/issues/311/ge-foods/about-ge-foods#
[6] CONSUMER REPORTS NATIONAL RESEARCH CENTER, FOOD LABELS SURVEY 4 (2014), *available at* http://www.greenerchoices.org/pdf/ConsumerReportsFoodLabelingSurveyJune2014.pdf.
[7] NATURAL MARKETING INST., *supra* note 1, at 27.
[8] CONSUMER REPORTS NATIONAL RESEARCH CENTER, FOOD LABELS SURVEY 7(2014), *available at* http://www.greenerchoices.org/pdf/ConsumerReportsFoodLabelingSurveyJune2014.pdf
[9] *See New Consumer Reports Study Finds GMOs in Many Common Food Products*, CONSUMERSUNION.ORG (Oct. 7, 2014), https://consumersunion.org/news/new-consumer-reports-study-finds-gmos-in-many-common-food-products/.
[10] For example, FDA has compelled disclosures unrelated to nutrition and health, including mandatory labeling for irradiation. When issuing the rule requiring irradiated foods be labeled, FDA concluded that irradiation was "material" because consumers view such information as important. 51 Fed. Reg. 13376, 13388 (Apr. 18, 1986). FDA has also required mandatory labeling for protein hydrolysates, noting that "the food source of a protein hydrolysate is information of material importance for a person who desires to avoid certain foods for religious or cultural reasons." 56 Fed. Reg. 28592, 28600 (June 21, 1991).

particular."[11] To assess whether the label is misleading, the act requires the FDA to take into account whether or not the label "fails to reveal facts *material* in the light of such representation or *material* with respect to consequences which may result from the use of the article (emphasis added)."[12] The legislative history of the Act clearly demonstrates that Congress understood "material" to mean a fact to which a "reasonable [person] would attach importance in determining [their] choice."[13]

Without doubt, the presence of genetically modified ingredients is a fact which many consumers are seeking in order to make choices in the marketplace. Recent surveys support the conclusion that consumers want information about GMOs in their food and would use this information to shape their choices.[14] The FDA has confirmed "the strong interest that many consumers have in knowing whether a food was produced using genetic engineering."[15]

Yet the FDA's decision-making regarding GMO labeling is rooted in outdated policy and science, developed without statutory support, creating a presumption that mandatory labeling is not required unless genetic modifications produce "organoleptic" or physical changes that can be detected with the senses.[16]

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[11] 21 U.S.C. § 343(a).
[12] 21 U.S.C. § 321.
[13] § 538 of the 1938 Restatement of Torts defines a fact as material if "its existence or nonexistence is a matter to which a reasonable man would attach importance in determining his choice of action in a transaction in question." *See, e.g.*, Milton Handler, *The Control of False Advertising Under the Wheeler-Lea Act*, 6 Law & Contemp. Probs. 91, 97-98 (1939). Other statutes also define "material" in this way. See e.g. TSC Industries v Northway, 426 U.S. 438 (1976) (finding a fact is "material" if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.")
[14] NATURAL MARKETING INST., *supra* note 2, at 43.
[15] U.S. Food & Drug Admin., *Questions and Answers on Food from Genetically Modified Plants*, FDA.GOV http://www.fda.gov/food/foodscienceresearch/biotechnology/ucm346030.htm (last updated July 22, 2014).
[16] U.S. Food & Drug Admin., 57 Fed. Reg. 22984 (1992)

Whether food contains genetically modified ingredients should not be limited to consumers in Vermont and Oregon. We strongly support a national mandatory GMO disclosure system. We hope that President Obama will follow through on his 2007 commitment to require GMO labeling,[17] and believe that FDA has a duty to act.[18] But, in the absence of leadership from the FDA and the Obama Administration, states have properly given consumers the right to know and to prevent consumer confusion.

Congress has long recognized a role for the states in food labeling.[19] State laws requiring GMO labeling or prohibiting certain "natural" claims are not pre-empted by the National Labeling and Education Act of 1990.[20] Congress explicitly recognized the longstanding role that states have played in food labeling in the NLEA and the Supreme Court recently reiterated the narrowness of NLEA's preemption provision in *POM Wonderful LLC v. Coca-Cola*.[21]

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[17] *See* Food Democracy Now, *Obama Promises to Label GMOs*, YOUTUBE.COM (Oct. 6, 2011), https://www.youtube.com/watch?v=zqaaB6NE1TI.

[18] 21 U.S.C. § 393 Sec. 406 of the FDA Modernization Act of 1997 makes "proper food labeling" a "mission" of the FDA.

[19] *Holk v. Snapple Beverage Corp*., 575 F. 3d 329, 334 (3rd Cir. 2009). States have required state-specific labels for food containing potentially hazardous ingredients, *see, e.g.,* Cal. Health & Safety Code § 25249.6 (for food that has been previously frozen), *see, e.g.,* Md. Code., Health-Gen. § 21-210(b)(11) (for cheese), Wis. Stat. §97.177(3), as well as "cottage industry" foods, *see, e.g.,* Tex. Health & Safety Code § 437.0193. In addition, states set different requirements for "use by" and "sell by" dates. See, e.g., 105 Mass. Code Regs. 520.119.

[20] Sec. 343-(1)(a)(2) of the NLEA prevents the addition of the term "genetically modified" from the ingredient list, not from the food package. NLEA expressly preserved a role for the states to regulate food labeling. Pub L. No. 101-535, Sec. 6(c)(1), 104 Stat. 2353, 2364 (1990) (providing that the NLEA "shall not be construed to preempt any provision of State law, unless such provision is expressly preempted."). In addition, courts have held that FDA's natural policy is not "entitled to preemptive effect." *Holk v. Snapple Beverage Corp.,* 575 F. 3d 329, 240 (3rd Cir. 2009).

[21] *Pom Wonderful LLC v Coca Cola,* 572 U.S. ___ (2014) (finding "it is significant that the complex preemption provision distinguishes among different FDA requirements.") *See also Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009) ("the case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.").

What's more, these state laws meet legitimate state interests[22] – such as facilitating religious dietary choices[23] or curing consumer confusion[24] – without placing an impermissible burden on interstate commerce.[25] There are many other reasons consumers want a disclosure, including both economic[26] and environmental[27] reasons.

In particular, consumers are deeply concerned that widespread adoption of GMO corn and soybeans has increased the use of herbicides by 527 million pounds between 1996 and 2012.[28] The overuse of glyphosate has contributed to herbicide-resistant "super weeds" that have caused farmers and regulators to turn to even more toxic herbicides that have been linked to serious health problems.[29]

Contrary to claims by some food companies, neither state nor federal labeling requirements will increase food prices. Food companies frequently change their labels to make new claims or highlight new innovations.[30] What's more, labor,

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[22] *Zauderer v. Office of Disciplinary Council of the Sup. Ct. of Oh*., 471 U.S.C. 626 (1985). *Zauderer* establishes that an informational disclosure is subject to "rational" review – that is, whether the required disclosure is reasonably related to the state's interest. Act 120's legislative findings are that genetically modified foods pose potential risks to agriculture and the environment, and legislative findings are entitled to deference. *See also Walters v. Nat'l Ass'n of Radiation Services*, 473 U.S. 305 (1985).

[23] *See Cutter v. Wilkinson,* 544 U.S. 709 (2005).

[24] *See Edenfield v. Fane,* 507 U.S. 761 (1993) (state has a substantial interest "in ensuring the accuracy of commercial information in the marketplace.")

[25] *National Electronic Manufacturers Association v. Sorrell*, 272 F. 3d 104, 110 (2nd Cir. 2001). The Second Circuit held that a similar labeling requirement that could lead manufacturers to "arrange their production and distribution processes to label products solely for Vermont" did not create a burden for commerce clause purposes.

[26] *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2741, 2756 (2010) (affirming that gene flow "injury has an environmental as well as an economic component").

[27] *See e.g.* John M. Pleasants & Karen S. Oberhauser, *Milkweed Loss in Agricultural Fields Because of Herbicide Use: Effect on the Monarch Butterfly Population*, Insect Conservation and Diversity (2012), *available at* http://www.mlmp.org/results/findings/pleasants_and_oberhauser_2012_milkweed_loss_in_ag_fields.pdf.

[28] *See,* Charles Benbrook, *Impacts of Genetically Modified Crops of Pesticide Use in the U.S. – the First Sixteen Years*, 24:24 ENVIRONMENTAL SCIENCES EUROPE (2012), *available at* http://www.enveurope.com/content/pdf/2190-4715-24-24.pdf.

[29] See David Mortensen, *Navigating a Critical Juncture in Sustainable Weed Management*, Bioscience (2013), available at http://bioscience.oxfordjournals.org/content/62/1/75.short; *See also* http://www.ewg.org/24D.

[30] Kai Robertson, *Why Label Changes Don't Affect Food Prices*, JUSTLABELIT.ORG (Sept. 11, 2013), http://justlabelit.org/wp-content/uploads/2013/09/Kai-Roberston-Food-Labeling-Study-2013.pdf. *See also* Andrew Dyke & Robert Whelan, *GE Foods*

ingredient and transportation costs as well as retail pricing strategies have a far greater impact on food prices than routine label changes.

There is no evidence to support arguments made by some food companies that people will simply reject foods that contain a factual GMO disclosure on the back of food packages. In fact, the evidence and experience to date suggest that the opposite is true. Studies show that people reading food packages tend to seek certain food attributes – such as the presence of fiber – and typically ignore the rest of the package.[31] Studies of consumers in other nations[32] that require GMO labeling confirm that consumers do not broadly reject foods produced with genetically modified ingredients.[33]

The debate over GMO labels is not about technology but rather about transparency. Although we would prefer a national food labeling solution, such as the solution proposed in H.R. 1699,[34] we strongly support state efforts to require GMO labeling and oppose H.R. 4432, the Safe and Accurate Food Labeling Act.

Labeling Cost Study Findings, CONSUMERSUNION.ORG (Sept. 12, 2014), https://consumersunion.org/wp-content/uploads/2014/09/GMO_labeling_cost_findings_Exe_Summ.pdf.

[31] Elise Golan & Fred Kuchler, *The Effect of GM Labeling Regime on Market Outcomes*, *in* GENETICALLY MODIFIED FOOD AND GLOBAL WELFARE (FRONTIERS OF ECONOMICS AND GLOBALIZATION, VOLUME 10) 263-81 (Emerald Group Publishing Limited 2011).

[32] *Labeling Around the World*, JUSTLABELIT.ORG, http://www.justlabelit.org/right-to-know/labeling-around-the-world/.

[33] *See, e.g.*, Carolina Gonzalez, Nancy Johnson, & Matin Qaim, *Consumer Acceptance of Second Generation of GM Foods: The Case of Biofortified Cassava in the Northeast of Brazil*, 60 J. of Agric. Econ. 604 (2009), *available at* http://ciat-library.ciat.cgiar.org/Articulos_Ciat/JAE_GonzalezJohnsonQaim_Finalrev.pdf (finding that Brazilian consumers more likely to purchase some foods labeled as genetically modified); *See also* Charles Noussair et al., *Do Consumers Not Care About Biotech Foods or Do they Just Not Read the Labels?*, 75 Econ. Letters 47 (2002); Nicholas Kalaitzandonakes et al., *Sentiments and Acts Toward Genetically Modified Foods*, 7 Int. J. of Biotechnology 161 (2005).

[34] HR. 1699, The Genetically Engineered Food Right to Know Act introduced by Rep. Peter DeFazio (D-Ore.), would render packaged food containing genetically modified ingredients misbranded if the package does not include a disclosure.

Supporters of H.R. 4432 claim their bill creates a "federal solution" that would "protect consumers by eliminating confusion."[35] In reality, H.R. 4432 would keep consumers in the dark by preempting state labeling laws, narrowing FDA's authority to craft a *mandatory* GMO labeling solution, and codifying the current *voluntary* labeling system that has fueled consumer confusion.

- **H.R. 4432 would not require *mandatory* food labeling.** Instead, H.R. 4432 codifies draft FDA guidance that permits *voluntary* GMO and *voluntary* non-GMO claims. The current system, which has permitted voluntary GMO and non-GMO disclosures since 2001, has failed consumers who believe "natural" and similar claims means "GMO-free" and who often fail to understand that the term "organic" bars the use of genetically modified ingredients.[36]

- **H.R. 4432 limits FDA's ability to craft a mandatory food labeling system.** H.R. 4432 codifies a 1992 policy that misinterprets Sec. 201 (n) of the FDCA to define "material" to mean "the attributes of the food itself." By codifying this policy, H.R. 4432 narrows rather than expands FDA's authority to work with food companies and consumer advocates to craft a national labeling solution.

- **H.R. 4432 fails to restrict "misleading" natural claims.** It merely requires the FDA to review the agency's current definition for "natural" and does not

[35] *See http://pompeo.house.gov/news/documentsingle.aspx?DocumentID=376238*
[36] NATURAL MARKETING INST., *supra* note 2, at 8.

prohibit the use of the word "natural" on foods containing genetically modified ingredients.[37]

- **H.R. 4432 pre-empts state labeling laws.** In addition to limiting FDA's authority, H.R. 4432 completely pre-empts states from giving consumers the right to know or from addressing consumer confusion. In particular, H.R. 4432 would preempt state actions from prohibiting misleading "natural" claims while the FDA develops new rules. This provision contradicts Congress' longstanding recognition of a state role in food labeling.

- **H.R. 4432 fails to reform FDA's food ingredient review system.** While we generally support more mandatory FDA reviews of food ingredients, H.R. 4432 fails to address longstanding flaws in FDA reviews[38] and allows foods with genetically modified ingredients to be sold even if FDA has not completed safety evaluations.

In conclusion, we strongly support mandatory GMO labeling. In the absence of federal action to create a mandatory GMO labeling system, we urge the Committee

[37] Even Monsanto defines genetically modified ingredients as "[p]lants or animals that have had their genetic makeup altered to exhibit traits that are not naturally theirs." *Glossary*, MONSANTO.COM, http://www.monsanto.com/newsviews/pages/glossary.aspx

[38] *See* Doug Gurian-Sherman, *Holes in the Biotech Safety Net* (2004), http://www.cspinet.org/new/pdf/fda_report__final.pdf. *See also* Tom Neltner & Maricel Maffini, *Generally Recognized as Secret*, NRDC.ORG (2013), http://www.nrdc.org/food/files/safety-loophole-for-chemicals-in-food-report.pdf.; Michael Hansen, *Reasons for Labeling of Genetically Modified Foods* (2012); William Freese & David Schubert, *Safety Testing and Regulation of Genetically Modified Foods*, CENTERFORFOODSAFETY.ORG (2004)

to support state laws that protect Americans' right to know and that protect them from misleading claims like "natural."

Thank you for the opportunity to testify.

Summary of Testimony of Scott Faber

- Consumers want to the right to know what is in their food and how it is produced.
- More than 90 percent of consumers want the right to know whether their food contains genetically modified food ingredients.
- GMO labeling will also help reduce consumer confusion created by misleading "natural" claims.
- Approximately 60 percent of consumers believe "natural" foods are GMO-free.
- A factual GMO disclosure on the back of food packages will give consumers information about genetically modified food ingredients and address consumer confusion.
- FDA has the authority to require a mandatory GMO disclosure.
- In the absence of FDA leadership, states can require a mandatory GMO disclosure.
- Congress has long recognized a role for the states in food labeling and the NLEA does not preempt state GMO labeling laws.
- State labeling laws meet legitimate state interests, such as addressing consumer confusion.
- GMO labeling will not increase food prices. Food companies routinely change labels to make new claims and consumers will not broadly reject foods with genetically modified ingredients.
- H.R. 4432 does not create a national *mandatory* labeling system. In fact, H.R. 4432 narrows FDA's ability to craft a national *mandatory* GMO labeling solution, preempts state GMO labeling laws, codifies the current *voluntary* labeling system that has failed consumers, and fails to restrict misleading "natural" claims.
- We strongly support a national *mandatory* GMO labeling system and, in the absence of federal leadership, support state laws to require GMO disclosures.