



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MARTHA COAKLEY
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

September 4, 2013

Liam Madden
52 Boylston Street
Jamaica Plain, MA 02130

Re: Initiative Petition No. 13-16: Genetically Modified Food Right to Know Act

Dear Mr. Madden:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition, which was submitted to the Attorney General on or before the first Wednesday of August of this year. I regret that we are unable to certify that this measure is in “proper form for submission to the people,” as required by Article 48, the Initiative, Part 2, Section 3. Our decision, as with all decisions on certification of initiative petitions, is based solely on art. 48’s legal standards; it does not reflect any policy views the Attorney General may have on the merits of the proposed law.

The proposed law would require that all food products containing genetically modified organisms (“GMOs”) be labeled prior to sale in Massachusetts. In addition to creating specific labeling requirements for particular types of food products, see id., § 3, the proposed law would mandate the “disclosure of the presence of genetically modified food . . . if such products are not labeled according to the standards herein at the time of transfer,” id., § 4. The proposed law also states that “[e]ntities throughout the food chain (such as food producers and food growers) that sell products containing GMOs or GMO fed animal products . . . must inform all direct recipients of their products” of the presence of GMOs. Id.

The proposed law creates an enforcement scheme, which would authorize the state Department of Health (“DPH”) to “conduct regular inspections, respond to reports of violations and levy fines and/or order the removal of improperly labeled items from sale venues.” Id., § 6(A). The proposed law states that “[e]ntities that supply GM products, and are aware of the presence of GM products, shall face criminal prosecution and fines if they obstruct the disclosure of the genetic status of their products or deceive parties seeking to document the presence of such products.” Id., § 6(A)(ii). Among the penalties specified for disclosure-related violations are: (a) a fine of no less than \$350,000 for “each case of deliberately concealing the presence of [] products [containing GMOs]”; (b) a fine not exceeding \$1,000 for a “[f]ailure to disclose GMO products in cases not considered deliberate concealment or obstruction”; and (c) a fine of no less than \$5,000, but not exceeding \$20,000, in cases of “improper disclosure that was not the result of deliberate misrepresentation,” on the part of “growers, suppliers, wholesalers, and GM



technology and/or seed stock firms that supply GM products or animal products raised with GMO feed.” Id., §§ 6(A)(ii)-(iii).

The proposed law contains several highly ambiguous provisions, which make it impossible for us to determine, and inform potential voters of, the meaning and effect of the proposed law. Most importantly, the penalties imposed by the proposed law are confusing and ill-defined. Section 6(A)(ii) provides, “Entities that supply GM products, and are aware of the presence of GM products, shall face criminal prosecution and fines if they obstruct the disclosure of the genetic status of their products or deceive parties seeking to document the presence of such products” (emphasis added). However, the same subsection only enumerates a penalty for “each case of deliberately concealing the presence of [GMO-containing] products,” and a penalty for failure to disclose that is “not considered deliberate concealment or obstruction.” Id. (emphasis added). It is unclear whether the mandatory criminal penalties for “obstruct[ing] [] disclosure[s]” and “deceiv[ing] parties” are the same as those specifically defined (in the same subsection) for “deliberately concealing” the presence of GMOs. Although the terms “deceive” and “deliberately conceal” (though not “obstruct”) may have similar meanings, ordinarily a statute that uses different terms is construed to mean different things by those terms. See Com. v. Williamson, 462 Mass. 676, 682 (2012) (“Where the Legislature used different language in different paragraphs of the same statute, it intended different meanings.”). You have suggested that, if we were to construe the various terms differently, then the proposed law should be read as leaving to the discretion of the enforcing entity (presumably DPH, though this is unclear)¹ the task of defining the mandatory criminal penalties for “obstruct[ing] the disclosure” of GMOs and “deceiv[ing] parties.” In our judgment, however, the specific nature of the criminal or civil penalties imposed is a feature of the proposed law that must be addressed in the “fair, concise summary” required by art. 48—particularly in light of the apparent magnitude of such penalties (up to \$350,000 for each violation) and the importance to citizens of defining criminal offenses and punishments with clarity. Yet, because of the way the proposed law is drafted, we cannot determine with certainty how that summary should read.²

Additionally, Section 6(A)(iii) imposes a penalty on “growers, suppliers, wholesalers,

¹ In light of the statement in Section 6(A) that the “labeling standards set forth in this act shall be carried out by [DPH]” (emphasis added), and the specific fines that “DPH may assess” for labeling violations under Section 6(A)(i), it appears that the fines relating to disclosures in Section 6(A)(ii) may not be imposed by DPH, but rather by some other entity, e.g., a court in a criminal prosecution.

² Though not an issue within the scope of our review, we also note that the proposed law may be subject to challenge as unconstitutionally vague, if it does not “define [a criminal] offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in manner that does not encourage arbitrary and discriminatory enforcement.” Com. v. Williams, 395 Mass. 302, 304 (1985), quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983); see also Mass. Fed. of Teachers, AFT, AFL-CIO v. Bd. of Educ., 436 Mass. 763, 780 (2002) (same; concerning civil statute).

and GM technology and/or seed stock firms” for any “improper disclosure that was not the result of deliberate misrepresentation” (emphasis added). It is unclear whether “deliberate misrepresentation” is intended to mean the same thing as “obstruct[ing] [] disclosure[s],” “deceiv[ing] parties,” or “deliberate conceal[ment],” such that it could lead to mandatory criminal penalties and fines under Section 6(A)(ii). This issue has added significance because, under Section 6(A)(ii), any “intentional violation” or “willful neglect” of the disclosure standards in the proposed law would be deemed to be the equivalent of “deliberate misrepresentation,” for purposes of imposing criminal penalties.

Finally, the disclosure standards in Section 4 are ambiguous. The core provision, which would require entities to disclose the presence of GMOs “if such products are not labeled according to the standards herein at the time of transfer,” appears to contradict the next provision, which requires that “[e]ntities throughout the food chain . . . must inform all direct recipients of their products” if any of those products contains GMOs. Id. (emphasis added). While you have suggested that the proposed law should be construed as imposing the former, more limited requirement, we are unable to determine from the language of the proposed law, which must be our guide, what conduct is being regulated. As noted, to the extent “deliberate misrepresentation” is intended to result in mandatory criminal penalties under Section 6(A)(ii), the provisions in Section 4 will have particular significance to voters.

In light of the omissions and unresolvable ambiguities described above, we cannot determine with certainty what certain provisions of the proposed law mean or would do. Accordingly, we are unable to certify that the proposed law is in “proper form,” as we cannot inform voters, through a “fair, concise summary,” what they are being asked to support. The purpose of Article 48’s requirement that the Attorney General certify a petition to be in “proper form” is, as stated in the Debates in the Constitutional Convention of 1917-18, “[t]hat we shall have a responsible officer . . . to certify that there are no mistakes[;] [t]hat such mistakes are possible, . . . even under the most careful, painstaking handling of the drafting of bills, every member of the Legislature knows . . . [including] mistakes which would change even the complete nature of a bill.” Nigro v. Attorney General, 402 Mass. 438, 446 (1988) (quoting Debates). Here, the multiple ambiguities and omissions in the proposed law appear to reflect drafting mistakes that certainly would “change . . . the complete nature” of important provisions, depending on which particular interpretations of the operative language were adopted.

For the foregoing reasons, Petition No. 13-16 cannot be certified under art. 48.

Very truly yours,



Tori T. Kim
Assistant Attorney General
617-963-2022

cc: William Francis Galvin, Secretary of the Commonwealth