

Do Companies Have a Fiduciary Duty to Label GMOs?

A roundtable discussion of Prop 37's impact with investors & lawyers

In the final tally, roughly 6 million consumers in California will have voted to label genetically modified ingredients. This was a losing charge, but the vote clearly stirred the activist spirit of food reformists and prompted much divisiveness and some derision within the natural products industry. Given the popular support for labeling, **NBJ** asked leading minds from the investment and legal communities to explore the notion of food companies now having a fiduciary duty to better label their products.

If you were considering investment in a conventional food company, how would you approach the GMO issue right now?

Rodney Clark, Managing Director at **Canaccord Genuity**: While the GMO issue might not be the only factor in evaluating a potential investment, certainly how a company handles this issue would be. I would find more attractive companies who are 'trend right'—and the trend appears to be toward better transparency in sourcing, ingredients and production.

John Barrymore, Managing Partner at

6Pacific: We are non-GMO advocates, but we recognize that we also have to do business while the world is developing a conscious awareness of the issue. We would invest in a conventional food company that is aware of its exposure to ingredients that may contain GMOs and has plans in place, even if longer term, to reduce that exposure.

David Thibodeau, Managing Director at **212 Equity**: The approach would be tailored to the specific situation. If a product is not being marketed as 'natural,' the screen is a bit different than if it is. There are certain food products that a consumer doesn't really care if they contain GMOs, because the product is inherently bad for you. Perhaps our approach is to transition the company that makes these products to a healthier place.

Robyn O'Brien, former analyst and author of **The Unhealthy Truth**: Unless a company is willing to voluntarily label these ingredients or make a commitment to phasing them out of their products, I would not invest in a conventional food company right now. Just in the last week,

some iconic food brands appear to be a bit rattled. **Twinkie** and **Wonder Bread** maker **Hostess Brands** filed for bankruptcy, and **McDonald's** has just seen its first sales slump in almost ten years. **Pepsico's** total operating profits have slumped 14%. If I were an executive at a conventional food company, I'd be figuring out how to build out my supply chain so that I could meet this growing demand from customers for non-genetically engineered ingredients, fewer pesticides and fewer artificial dyes and growth hormones. It's a great brand building opportunity. Own it.

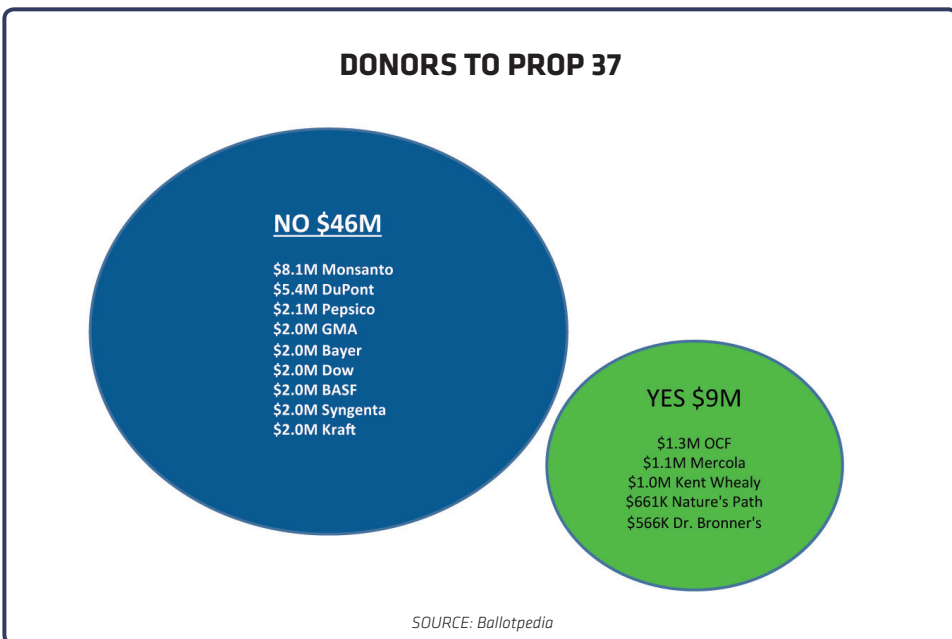
Brette Simon, Partner at **Bryan Cave**: The labeling issue is not going away. Food companies need to be aware of and prepare for the fact that the impacts of labeling go well beyond just adding language to a food label. As a result, investors will need to beef up their diligence efforts on this front. Investors need to look upstream, to a company's suppliers and suppliers' suppliers, to review their production methods, to ensure that labeling claims are accurate and to assess any vulnerabilities.

Does the defeat of Prop 37 in California strike you as an unequivocal 'win' for the industries that opposed it?

Clark: It's merely a temporary win. The long term trend is toward better transparency and better information—which get to safety and health. It is simply a matter of time before we see some version of this type of legislation that enables consumers to better understand what they are ingesting.

Barrymore: The broad-based exposure here has led to much more awareness by consumers of the GMO issue. **Whole Foods** has adopted a non-GMO position and cannot turn back now. Even though Prop 37 was defeated, this issue is now much more important for everyone in the industry.

Thibodeau: It's a major wake-up call. I be-



lieve all the money spent trying to defeat the proposition actually created a huge amount of interest and concern. The issue is now on people's radar screen. Consumers are going to vote with their dollars, and food-source transparency will continue to gain traction. Those companies that ignore it will do so at their own financial peril.

Justin Prochnow, Shareholder at **Greenberg Traurig**: The defeat does not strike me as an unequivocal win for the industries that opposed it. In my opinion, Prop 37 was defeated, in large part, due to the bounty provisions that were attached. Despite the protestations of the people behind Prop 37, many felt it was going to be Prop 65 all over again, but to an even greater degree.

O'Brien: I don't think anyone wins when you have a food fight of epic proportions like this one. That \$46 million brought attention to an issue that the chemical and pesticide industries probably wish would go away. \$46 million raised the cover on the issue, and millions of consumers voted for full transparency when it comes to these new ingredients in our food. Would I ignore that as an executive of a food company? Not at all. The fates of the food companies do not need to be tied to the fates of the chemical and pesticide companies. If pink slime is any indication of what consumer sentiment can do to an industry, seemingly overnight, I would consider it my fiduciary duty to manage that risk and build out a supply chain that contains non-genetically engineered ingredients in order to meet consumer demand and reduce liability.

Simon: The issue is not going away. Supporters of Initiative 522 in the State of Washington are collecting signatures and expect to be on the ballot in 2013. It would also not be surprising to see Prop 37 return in California, perhaps in a scaled-down version that addresses many of the criticisms leveled

against it in 2012. Regardless of whether such legislation passes, companies need to make sure they can substantiate the claims made in their packaging and labeling, or run the risk of a false advertising claim. Such litigation is becoming more focused and sophisticated, and thus may prove to be successful for activists using litigation as a private party regulatory tool.

John Shaw, CEO of the **Natural Products Association**: I would not say it's an unequivocal win for anybody. This issue gained a lot of ground during the Prop 37 debate, even with its ultimate defeat. GMO is on the radar of every food company and every retailer out there as well as many consumers.

Will we see even more lawsuits over natural label claims now?

Clark: I don't think this necessarily increases lawsuits, but I would be surprised if the 'smart' companies—those who see where the longer term trends are headed—don't begin to address the issue in a preemptive fashion.

Barrymore: Proper labeling is one of the most critical issues of this decade. For certain, litigation over labeling will increase in activity rather than decline over the next few years.

Thibodeau: Plaintiff lawyers will be plaintiff lawyers, and as long as there is a buck to be made they will go after it. We saw the negative effects of Prop 65 and the frivolous lawsuits that resulted. It's incumbent for companies and industry to get ahead of this on their own before a lot of money is wasted on an issue that has a somewhat simple remedy.

Prochnow: The striking down of Prop 37 is not likely to stop litigation over GMOs and 'all natural' claims. In fact, on election day, a case was filed in Colorado against **Pep-**

peridge Farm for 'natural' claims on goldfish crackers that allegedly contain GMOs. Until the FDA formally defines natural, lawsuits over 'all natural' or 'natural' claims will continue to be brought with regularity by plaintiff lawyers. Note the relative lack of any litigation over 'organic' claims, claims which are specifically defined by USDA. Without a formal definition, it essentially becomes a question for a judge or jury to decide. Most plaintiff lawyers know that companies do not have the appetite or financial resources to enter prolonged litigation for an issue that is still basically a 50/50 call.

O'Brien: The best thing the legal community could do would be to draft legislation in all 50 states and to help the FDA figure out how to implement this at the federal level. The cost of labeling on a state by state basis is not in the industry's best interest. But changing labels is common practice. The industry labels these ingredients in other countries around the world where they sell their food. They also label allergens, fat content, gluten free, and those labels are constantly changing. Adding the words 'genetically engineered' in front of soybean or canola oil, or in front of the words 'corn starch' is not going to be what breaks the bank. What might get expensive for them is if the customer base begins to shrink once consumers are aware that these ingredients have been inserted into some of their favorite foods without their knowledge.

Shaw: We continue to see lawsuits about natural label claims—both before Prop 37 and after. I can only imagine corporate lawyers are doing everything possible to protect their companies, including preemptively removing "natural" or other claims that might result in lawsuit. Again, I think being open and honest with your customers can avoid a lot of these potential issues. 🍋

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