Order Code 95-353 ENR
Updated March 25, 2004

CRS Report for Congress
Received through the CRS Web

Federal Farm Promotion ("Check-Off") Programs

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Summary

Over the past 35 years Congress has enacted laws authorizing generic promotion ("check-off") programs for various farm products. Supporters view them as self-help activities demanding minimal government involvement and cost. Producers and, often, importers are required to pay an assessment, usually deducted from revenue at time of sale — thus the name *check-off*. However, some farmers contend they are being "taxed" for advertising and related activities they would not underwrite voluntarily, and have challenged the constitutionality of the programs in federal courts, with some successes — making the programs' future unclear. This report will be updated if events warrant.

Over the past 35 years, Congress has enacted laws authorizing national generic promotion ("check-off") programs for various farm commodities.[1] Interest in new check-off programs increased during the 1980s and 1990s, as various commodity groups sought new methods of support for their products. These programs are viewed as farmer self-help activities requiring minimal federal involvement or funding. USDA's Agricultural Marketing Service (AMS) has some administrative and oversight responsibilities, but the producer boards who run the programs reimburse the agency for such costs.

Federally sanctioned programs collected assessments for 16 commodities: **avocados** (implemented in 2003; $12.8 million collected in the first nine months), **beef** ($45.9 million collected in 2003), **blueberries** ($1.2 million in 2003), **cotton** ($61 million), **dairy products** ($86.2 million), **eggs** ($18 million), **fluid milk** ($105.8 million), **honey** ($3.3 million), **lamb** ($2.7 million), **mushrooms** ($1.8 million), **peanuts** ($7.6 million), **popcorn** ($600,000), **pork** ($43.1 million), **potatoes** ($8.5 million), **soybeans** ($36.2

[1] This report focuses on free-standing generic promotion programs; it generally does not cover similar promotion activities linked to marketing orders authorized by the Agricultural Marketing Agreement Act of 1937 as amended. See CRS Report RS20512, *Federal Marketing Orders for Fruits, Vegetables, and Specialty Crops*. For a fact sheet on promotion programs and their requirements, congressional requesters may contact USDA at 720-3203.

million), and **watermelons** ($1.3 million).[2] Other check-offs have been authorized by Congress but either were not implemented or were terminated by producers in referenda (e.g., for **wheat**, **flowers**, **limes**, **sheep**, and **pecans**).

Title V of the Federal Agricultural Improvement and Reform Act of 1996 (P.L. 104-127) gave USDA broad-based authority to establish national generic promotion and research programs for virtually any commodity, either at its own initiative or upon the request of an industry group, without waiting for specific legislative authority. Prior to the 1996 law, a check-off necessitated passage of specific authority for an individual commodity — a route that some producer groups still follow. For example, the Hass Avocado Promotion, Research, and Information Act of 2000, signed into law on October 23, 2000, explicitly authorized the program that took effect September 9, 2002.

Rationale

Many billions of dollars are spent annually on "branded" U.S. food advertising and promotion, where one producer pits its name brand against the names of others offering a similar or substitute product. Perdue chicken and Tropicana orange juice commercials are examples of branded advertising. Generic ads, on the other hand, have no connection to the name of a specific producer. Because producers of a basic agricultural product cannot easily convince consumers to choose a particular egg or potato over another, generic advertising can help to expand total demand for the product, it is argued. Generic advertising also uses television, radio, and other media to reach consumers. The *Beef: It's What's for Dinner*, and milk mustache ads are examples. The programs also seek to expand foreign markets and to fund research and education, such as development of new or improved products or surveys of consumer behavior.

Producers can and do organize *voluntary* check-offs, but they account for only a small share of all funding for generic efforts. Since the prototype Florida Citrus Advertising Tax was instituted in 1935, hundreds of mandatory farm commodity promotion programs have been legislated by states or the federal government. Nine out of 10 U.S. farmers were contributing to one or more of these efforts by the mid-1990s.[3]

Numerous commodity groups prefer mandatory check-offs as a way to address the so-called "free rider" problem — nonpaying producers who benefit economically from programs that others have funded. Requests to Congress or USDA to authorize mandatory check-offs have been prompted by various factors, including the search for new ways to stimulate product demand, particularly as farm markets have globalized. Increasing foreign competition has caused U.S. producers to seek more money — from both public and private sources — to promote food and agricultural sales in other countries. Also, a belief that voluntary efforts have been ineffective, and the perceived successes of existing mandatory check-offs, may contribute to interest in new programs.

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[2] Source: USDA Budget Explanatory Notes for FY2005. Reflects amounts that go to national boards. Some programs collect additional sums but return them for state-level activities.

[3] Armbruster, Walter J., and John P. Nichols. *Commodity Promotion Policy.* 1995 Farm Bill Policy Options and Consequences, Texas A&M University, October 1994.

Legal Challenges

Even as new check-offs are being considered, some producers are vigorously (and in some cases, successfully) challenging existing programs, creating future uncertainties for all check-offs. These producers contend that the check-off is a "tax" to fund advertising and other activities they would not pay for voluntarily. Numerous producer lawsuits have questioned the constitutionality of generic check-off programs. Two cases have reached the U.S. Supreme Court, with quite different results.

In *Glickman v. Wileman Brothers and Elliot, Inc.*, California peach and nectarine handlers challenged the USDA marketing order, which is not only a promotion program but also sets quality standards and other marketing rules for those fruits (see footnote on page 1). The 9th Circuit Court of Appeals had held that the order mandating the assessments violated the affected parties' First Amendment rights and therefore was unconstitutional. The Circuit Court stated that such generic advertising had not been proven necessary or more successful than individual advertising, and also, in effect, violated the free speech of growers who would prefer to use their money to advertise in other ways. The government appealed the case to the Supreme Court, which on June 25, 1997, reversed, by a 5-4 vote, the lower court's ruling. It found that the program "should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress. The mere fact that one or more producers 'do not wish to foster' generic advertising of their product is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial."[4]

However, on June 25, 2001, the Supreme Court, in *United States v. United Foods, Inc.*, ruled, by a 6-3 vote, that mandatory assessments for the mushroom check-off were a violation of the First Amendment and therefore are unconstitutional because they force producers to pay for commercial speech. Upholding a decision by the 6th Circuit Court of Appeals, the Supreme Court reasoned that the program authorized by the Mushroom Promotion Act differs fundamentally from that under *Glickman*. The court said that the mushroom check-off is a stand-alone program that is not part of a broader regulatory scheme, as was the marketing order for peaches and nectarines.

> In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.... Beyond the collection and disbursement of advertising funds there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions.[5]

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[4] *Glickman v. Wileman Bros. & Elliot, Inc.* 521 U.S. 457, 477 (1997).

[5] *United States v. United Foods, Inc.* 533 U.S. 405, 412 (2001). Since the Court's decision, the Mushroom Council, the producer board that administers the program, in 2001 reduced the mandatory assessments and diverted their revenue to non-promotional activities. The Council began soliciting voluntary contributions to use for generic advertising.

Legal experts who have studied the two cases generally agree that stand-alone check-offs (those covered in this report) are likely more vulnerable to challenges than promotion that is part of a marketing order authorized by the Agricultural Marketing Agreement Act of 1937. However, these experts also conclude that the Supreme Court did not specifically prescribe what level of regulation is needed to provide protection against such challenges. Another issue not addressed by the Supreme Court's mushroom ruling was whether the speech compelled under the check-offs could be deemed "government speech," which might be more likely to pass Constitutional muster, these experts noted.

The 2001 Supreme Court decision has influenced other lawsuits. On June 21, 2002, a U.S. District Court in South Dakota ruled, in *Livestock Marketing Association v. United States Department of Agriculture*, that the national beef check-off also violates the First Amendment by forcing producers "to pay, in part, for speech to which the plaintiffs object." The court further ruled that the generic advertising conducted under the Beef Promotion and Research Act and the ensuing Beef Order is not government speech. On October 17, 2003, the 8th Circuit Court of Appeals announced that it would not reconsider the District court's ruling.

In another case, on October 25, 2002, a federal judge ruled, in *Michigan Pork Producers v. Campaign for Family Farms v. Ann Veneman*, that the pork check-off also is unconstitutional because it violates complainants' rights of free speech and association. The judge made reference to the *United Foods* decision. On October 22, 2003, a three-judge panel of the Sixth Circuit Court of Appeals agreed with the lower court's ruling. However, on November 1, 2002, a district judge in Montana ruled, in *Jeanne Charter and Steve Charter v. USDA*, that the speech compelled under the beef check-off law "constitutes support for government speech" and "does not violate the rights of free speech or association." The U.S. Justice Department, defending the beef and pork check-offs, has asked the U.S. Supreme Court to consider both the South Dakota and Michigan cases. Ultimately, Congress might be asked to re-examine their statutory basis.[6]

Producer Referendums

Dissident industry groups also have worked outside of the courts, usually by seeking producer referendums where they hope to win enough votes to terminate the programs. Most of the current check-offs contain provisions enabling USDA, the promotion boards and/or a minority of producers to petition for a vote on whether to terminate the program. The 1996 farm law providing USDA with standing check-off authority permits new programs to start with either delayed or prior referendums, but they also must have periodic referendums in later years to test continued support.

Legislation creating the dairy, beef, and pork programs in the 1980s stipulated that they were to operate for a prescribed period before referendums on whether to continue

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[6] More analysis of the check-offs is in the July-August 2001 and September-October 2003 issues of *The Agricultural Law Letter* published (at [http://www.agriculturelaw.com]) by the law office of McLeod, Watkinson, & Miller, which has assisted groups to establish check-offs; and in *Promotion Checkoffs, Why So Controversial? The Evolution of Generic Advertising Battles* (September 2001) by John M. Crespi, Cornell University National Institute for Commodity Promotion Research and Evaluation.

them could be held. In each of these cases, producers did vote to continue them. However, producers rejected pecan, lime, and flower programs in delayed referendums. Proponents of delayed (as opposed to up-front) referendums say the trial period gives producers experience with the program; opponents contend that they are undemocratic and allow for, at best, a subjective evaluation of benefits.

The Livestock Marketing Association in 1999 submitted a petition to USDA seeking a referendum on whether the beef check-off should be discontinued. USDA rejected the petition in early 2001 after determining that the number of signatures fell short of the 108,000 signatures or 10% of all producers required to institute the referendum.

In another high-profile case, USDA in late 2000 held a non-binding referendum on whether to continue the pork check-off at the behest of several producer groups led by the Campaign for Family Farms. The groups prevailed, by about 1,500 producer votes, to end the program, but the National Pork Producers Council (NPPC) subsequently won a temporary restraining order to prevent USDA from publishing a final termination rule. A February 2001 settlement agreement was reached, whereby the check-off would continue with modifications, including assurances that the check-off board would operate independently of NPPC and be more responsive to producers' concerns about its activities.

Other Considerations

Government Role and Oversight. Once a program is authorized and requested by an industry group, AMS works with the group on start-up and operating details, prepares formal regulations, and holds a producer referendum. The Secretary of Agriculture appoints members for the check-off boards, based on industry nominations. AMS has the responsibility for approving board budgets, plans, projects, and contracts. AMS among other things has published oversight guidelines aimed at ensuring that the boards — which function as the programs' governing and managing bodies — meet all legislative, regulatory, and Departmental policy requirements.

However, some producers, importers, and the Department's Inspector General have contended that AMS's oversight has been weak. These critics have charged that producer dollars often have been spent on lavish entertainment of clients or on other activities they consider inappropriate — and that the agency had done little to constrain such spending. AMS and the check-off boards have countered that most funds are properly spent, and, moreover, that Congress specifically intended for these programs to be producer-run, with minimal USDA interference. Other than ensuring the legality of program activities, it is not government's role to second-guess a producer-elected board's business decisions, even if, in retrospect, they appear to be ill-advised, it has been argued. In fact, when AMS has challenged a board's activities, producers at times have asked Members of Congress to intervene against the Department.

Program Effectiveness. Economists have been engaged in research on this question. Studies of advertising for specific dairy, citrus, and several other products have generally found a positive relationship between the amount of money invested in generic advertising and sales of the advertised commodity, although the "law of diminishing returns" may apply — that is, as advertising expenditures increase, sales do increase, but at a slower rate. Ten years ago, Forker and Ward generally confirmed these conclusions, and cautioned that "producer welfare" might not improve in all instances, also noting:

> The magnitude of [producer] benefits [if any] depends on the level of advertising investment, the nature of other kinds of promotion programs associated with it, the nature and extent of the research effort, the quality of the advertising and promotion effort, the nature of the commodity, and the extent to which consumers and producers respond.[7]

Economists widely believe that program evaluation should be an integral part of any generic commodity promotion activity. The 1996 farm law requires an independent evaluation, at least every five years, of the effectiveness of each established program.

Advertising Versus Advocacy. Virtually all federal promotion laws contain a prohibition against using assessments "in any manner...for the purpose of influencing governmental policy or action." However, some critics regard the distinction between selling a product to consumers and promoting it politically to lawmakers as a narrow one, particularly as check-off funding raises a particular commodity's national visibility. This policy question is further complicated if a national check-off program staff is housed in the same offices as that commodity's trade association, or where the trade association receives contracts from the check-off board to carry out some "permitted" activities.

Commodity "Cannibalism". As more check-offs are added, at what point are commodity groups simply chasing the same consumer dollars — particularly in the United States, where total per capita food consumption is not likely to grow? For example, if one promotion convinces consumers to eat more beef and pork, will they eat less fish or chicken?

Industry Representation. Mandatory programs must be carefully designed to ensure that all contributing producers benefit equitably. One key is board composition. How are representatives chosen? Will the boards represent all geographical production areas and all types of producers, including minority, limited resource, or other potentially disadvantaged producers? These questions have become more pertinent as agriculture, and the food industry it serves, both experience major structural changes — e.g., vertical coordination has enabled end sellers to create more unique brand-name products from what was once a largely homogeneous commodity. A related policy question is how to treat importers of affected commodities, particularly as agricultural markets shift from primarily domestic to global ones. Increasingly, importers are being required to pay assessments, but also are being given seats on governing boards.

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[7] Forker, Olan D., and Ronald W. Ward. *Commodity Advertising: The Economics and Measurement of Generic Programs*. Lexington Books, New York, 1993. A more recent broad look at the federal check-offs has been under way, said an expert at Cornell University's National Institute for Commodity Promotion Research and Evaluation, who speculated that the Forker-Ward conclusions likely are still relevant.