Order Code 95-353
Updated April 17, 2007

CRS Report for Congress

Federal Farm Promotion ("Check-Off") Programs

Geoffrey S. Becker
Specialist in Agricultural Policy
Resources, Science, and Industry Division

Summary

The U.S. Supreme Court in 2005 affirmed the constitutionality of the so-called beef check-off program, one of the 17 generic promotion programs for agricultural products that are now active nationally. Supporters view check-offs as economically beneficial self-help activities that need minimal government involvement or taxpayer funding. Producers, handlers, and/or 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. The Supreme Court's decision to uphold the beef check-off is considered significant for the future of the other programs, although the Court left open the possibility of additional challenges.

Although check-off programs, particularly at the state and regional levels, have existed for many decades, interest appeared to increase during the 1980s and 1990s, as commodity groups sought new ways to support their products. Such groups viewed the programs as economically beneficial 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-contributor boards that run the programs must reimburse AMS for such costs.[1]

Congressionally authorized programs collect assessments for 17 commodities (with the year they began, and collections for the most recent year reported, generally 2005): **beef** (1986; $80.4 million), **blueberries** (2000; $1.8 million), **cotton** (1966; $83.6 million), **dairy products** (1984; $278.7 million), **eggs** (1976; $20.2 million), **fluid milk** (1993; $107.1 million), **Hass avocados** (2002; $20.6 million), **honey** (1987; $3.6 million), **lamb** (2002; $2.4 million), **mangos** (2005; $3.9 million estimated), **mushrooms**

[1] This report focuses on free-standing generic promotion programs; it generally does not cover the similar promotion activities which are part of the regulations dictated by marketing orders authorized by the Agricultural Marketing Agreement Act of 1937 as amended. For greater detail on all of these programs, see the USDA-AMS website at [http://www.ams.usda.gov/].

(1993; $1.7 million), **peanuts** (1999; $6.7 million), **popcorn** (1997; $500,000), **pork** (1986; $60.8 million), **potatoes** (1972; $8.7 million), **soybeans** (1991; $82.8 million), and **watermelons** (1990; $1.5 million). Among other check-offs that have been authorized but either not yet implemented, or terminated by producers in referenda, are **canola and rapeseed**, **wheat**, **flowers**, **kiwifruit, limes**, and **pecans**.[2]

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 uses television, radio, and other media to reach consumers. The *Beef: It's What's for Dinner* and *Pork: The Other White Meat* ads have been 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. (Such activities are generally directed by the producer boards and approved by AMS.)

Producers can and have organized *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 ten U.S. farmers were contributing to one or more of these efforts by the mid-1990s.[3]

Many 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 agricultural sales in other countries.

---

[2] Source: AMS, unpublished spreadsheet. The beef, dairy, pork, and soybean programs transfer a portion of these total collections 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.

Recent Legal Challenges

Some producers have vigorously challenged mandatory check-off programs. Some have asked USDA to change or abolish orders it has issued on behalf of the commodity boards, or petitioned the department to hold a producer referendum on whether a check-off should continue. Some producers also have filed lawsuits in federal courts. Their key contention has been that the check-off is a "tax" to fund advertising and other activities they would not pay for voluntarily. Three cases have reached the U.S. Supreme Court.

In the first, *Glickman v. Wileman Brothers and Elliot, Inc.*, California peach and nectarine handlers had 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 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]

In the second case, the Supreme Court on June 25, 2001, ruled 6-3 that mandatory assessments for the mushroom check-off were a violation of the First Amendment because they force producers to pay for commercial speech. Upholding a decision by the 6th Circuit Court of Appeals, the Supreme Court reasoned, in *United States v. United Foods, Inc.*, 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 peach/nectarine marketing order, and "... for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme...."[5]

The Supreme Court issued its third decision on May 23, 2005. The case, *Johanns v. Livestock Marketing Association*, stems from a ruling on June 21, 2002, by a U.S. district court in South Dakota that the national beef check-off violates the First Amendment by forcing producers "to pay, in part, for speech to which the plaintiffs object." The district court further ruled in the case that the generic advertising conducted under the Beef Promotion and Research Act and the ensuing Beef Order is not government speech. The 8th Circuit Court of Appeals announced that it would not reconsider the district court's ruling. Appealing to the Supreme Court, the federal

---

[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). After 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 such as research into mushrooms' health and nutritional attributes.

government argued a point that the Justices had not considered in the mushroom case: that check-off messages constitute government speech, and so are not susceptible to a First Amendment challenge. The Supreme Court, in a 6-3 decision, ruled in favor of the government, upholding the program. The Court stated, in part:

> The message set out in the beef promotions is from beginning to end the message established by the Federal Government. Congress had directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain. ... Thus, Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well).[6]

The Supreme Court majority also rejected check-off opponents' argument that the program does not qualify as government speech because it is funded by a targeted assessment rather than by general revenues (e.g., taxes). "Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object," the Court concluded.

In a May 23, 3005, press release, Secretary of Agriculture Johanns said that he was pleased with the decision. The House Agriculture Committee Chairman, the National Cattlemen's Beef Association, the National Pork Producers Council, the American Farm Bureau Federation, and the National Milk Producers Federation were among the groups that also reacted favorably to the Supreme Court's decision. The National Farmers Union joined the Livestock Marketing Association in expressing disappointment with the decision. (A subsequent settlement, filed by defendants and plaintiffs, included a check-off funded survey of producers' views toward the program.)

Outlook and Issues

Since the *Johanns* decision, several other closely watched legal challenges of the programs have been stalled or even ended, including others on beef, and on dairy, pork, watermelons, and cotton. *Johanns* also is widely expected to be used to defend future First Amendment challenges.[7]

However, it is possible that check-off opponents could continue to challenge other legal aspects of the programs in the courts. For example, the Supreme Court did not address the question of whether or not a check-off might be unconstitutional if it were found that the advertisements are attributable to individuals who disagree with a funded message.

---

[6] *Johanns v. Livestock Marketing Assn.* and *Nebraska Cattlemen v. Livestock Marketing Assn.* (Nos. 03-1164 and 03-1165).

[7] This section is based in part on archived CRS Report RL32957, *Farm Product "Check-Off" Programs: A Constitutional Analysis*, by Stephen R. Viña. That report contains an extensive discussion of these cases and their potential implications.

As the Supreme Court noted, Congress retains final oversight and statutory authority. It remains to be seen whether check-off advocates — or opponents — will continue to examine the need for, and seek, any statutory changes. Nonetheless, the *Johanns* decision could inform any new legislation creating or amending check-off programs. Among the other issues are the following.

Are Check-offs Effective? All of the federal check-off programs and many state ones are required by law to periodically evaluate their effectiveness. The ultimate measure has been whether those who contribute to the programs gain economically. More to the point, do the economic benefits outweigh the costs of assessments? Researchers examine a variety of indicators such as changes in product sales, producer prices, market share, industry profits, and consumer awareness of the products or product attributes. Examining past and projected market and related industry data is one method for making such determinations; another method is industry and consumer surveys. However, these approaches encounter difficulties in trying to isolate the impacts of program promotion dollars from other variables, such as the relative prices and availability of competing products (e.g., poultry vs. beef and/or pork; milk vs. juice or soft drinks), changes in consumer income, demographics, shopping preferences, and so forth.

Economists try to account for these variables through the use of increasingly sophisticated economic models. Most of the studies, including those based on the models, typically have found positive ratios of benefits compared with costs — ranging from 2-1 benefits over costs to as high at 10-1. However, even these analyses can be widely interpreted and may not answer such questions as whether a higher ratio necessarily signals a more "effective" program; whether all types of contributors share equally in the benefits; whether others, such as consumers and processors who do not directly contribute, gain (or lose) economically; or whether investing the funds in some other way — like buying stocks — might yield higher returns.[8]

What Types of Activities Are Appropriate? Funds collected can be used by the boards, which meet regularly and submit their plans to USDA-AMS for review, for a wide variety of activities, with the common objective of enhancing product demand. Virtually all check-off laws include language prohibiting the use of funds for any type of activity to influence government policies or actions. However, some critics have regarded the line between advertising and advocacy as a blurry one: for example, at least one group once periodically used its funds for advertisements in Washington, D.C.-based publications that promoted the image of the industry as a whole. This question is further complicated if a check-off program staff is housed in, or near, the same offices as that commodity's trade association or if the association contracts to carry out some "permitted" activities.

In another disputed use of funds, the U.S. Environmental Protection Agency (EPA) agreed to a limited and conditional release of liability for past and ongoing violations of air pollution laws by animal feeding operations (AFOs) that participate in a national study

---

[8] This paragraph is based on Gary W. Williams and Oral Capps Jr., "Measuring the Effectiveness of Checkoff Programs," *Choices* magazine, 2nd quarter 2006. Accessed online at [http://www.choicesmagazine.org].

of air emissions and that, among other things, pay $2,500 per farm to help fund it. The National Pork Board agreed to commit $6 million in check-off funds to cover the $2,500 fees from the more than 1,800 hog farms with approved agreements. A coalition of groups called the Campaign for Family Farms challenged this commitment, and on October 24, 2006, a USDA administrative law judge blocked the Pork Board from spending the money (AMA PPRCIA Docket No. 05-0001). The judge stated that the spending was "contrary to public policy and not in accordance with law." An appeal of the decision is pending.

Industry Governance and Representation. When Congress approves a check-off, it generally does not begin until an industry group proposes and AMS issues an order, following federal rulemaking procedures. Often, but not always, a referendum among affected parties is required before it takes effect. Once an order is underway, periodic referenda may be held to assess support for its continuation. Most check-off laws provide guidance, often specific, on the make-up and establishment of the industry governing boards that oversee program staff and set policy and priorities (which are subject to USDA review and approval). One concern is how to ensure that all contributing parties are chosen and represented fairly (with regard to geography, operation size, importer or domestic, and so forth). Such questions have become more prominent among those groups, which allege that major structural changes in their industry have enabled what they believe to be more powerful economic interests to dominate check-off efforts.

Some believe that the *Johanns* decision might spur Congress, for instance, to consider exempting certain categories of producers who disagree with generic advertising from paying mandatory assessments under a commodity promotion law similar to the exemption that Congress established in the 2002 farm bill (P.L. 107-171) for persons that produce and market solely 100% organic products. Congress might also seek to further define or expand current provisions in commodity promotion laws that already require councils and projects to "take into account similarities and differences" between certain products and producers.

Congress may also be asked to reexamine its position on requiring the advertisements to show that they are, in fact, speech by the government, since this was a major criticism in the dissent and all circuit courts found insufficient governmental control. As mentioned by Justice Ginsburg in her concurring opinion in *Johanns* and by some experts, a clear indication of who the speaker is may be important to reconcile the message in check-off programs with other speech that is overtly sponsored by the government, particularly the nutritional and dietary guidelines (e.g., "Food Pyramid"). The most recent federal Dietary Guidelines, for example, encourage greater consumption of fruits, vegetables, whole grains, and low-fat dairy, within a balanced, lower-calorie intake diet, while check-off programs generally encourage more consumption of both low-fat and high-fat beef, pork, and dairy products.[9] (On the other hand, several of the programs are for fruits or vegetables.)

---

[9] These arguments are adapted from, and based on sources in, CRS Report RL32957.