

# CRS Report for Congress

Received through the CRS Web

## Federal Farm Promotion (“Check-off”) Programs

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

### 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. To fund them, 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 activities they would not underwrite voluntarily, and have challenged the programs before the U.S. Department of Agriculture (USDA) and in the courts. 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.<sup>1</sup> 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 are operational for 15 commodities: **beef** (implemented in 1986; \$86 million in annual assessments); **blueberries** (2000; \$1 million); **cotton** (1966; \$60 million); **dairy products** (1984; \$254 million); **eggs** (1976; \$18 million); **fluid milk** (1993; \$110 million); **honey** (1986; \$3.5 million); **lamb** (starting in July 2002; \$3 million expected); **mushrooms** (1993; \$2 million); **peanuts** (1999; \$10 million); **popcorn** (1997; \$600,000); **pork** (1986; \$57 million); **potatoes** (1972; \$9 million); **soybeans** (1991; \$62 million), and **watermelons** (1990; \$1.5 million). For some

---

<sup>1</sup> 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.

of these, significant portions of total collections are returned to fund related state-level activities. (Other check-offs have been authorized by Congress, but either were not implemented or were terminated by producers voting in referenda, such as check-offs for **wheat**, two separate ones for **flowers, limes, sheep, and pecans.**)

Title V of the Federal Agricultural Improvement and Reform Act of 1996 (P.L. 104-127) gave the Secretary of Agriculture broad-based authority to establish national generic promotion and research programs for virtually any commodity, either at his/her 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 some producer groups still follow. For example, the **Hass Avocado** Promotion, Research, and Information Act of 2000 was signed into law on October 23, 2000, and producers were scheduled to vote in a June 24-July 12, 2002, referendum, on whether to launch the program.

## Rationale

Most of the roughly \$24 billion spent annually on U.S. food advertising and promotion is “branded,” with one producer pitting its name brand against the names of others offering a similar or substitute product. Perdue chicken and Blue Diamond almond commercials are examples of branded advertising. Generic ads, on the other hand, have no connection to the name of a specific farmer or manufacturer. Because producers of a basic agricultural product cannot easily convince consumers to choose a particular egg or orange over another, generic advertising can help to expand total demand for the product, it is argued. Like its branded counterpart, generic advertising 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 seek to expand foreign markets too. Check-off money also is spent on research and educational activities, 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.<sup>2</sup>

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-off programs 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 promotion efforts have been ineffective, and the perceived successes of existing mandatory check-offs, may contribute to interest in establishing additional programs.

---

<sup>2</sup> 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 challenging existing programs. These critics contend that the check-off is a “tax” to fund 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 9<sup>th</sup> 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.”<sup>3</sup>

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 6<sup>th</sup> 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.<sup>4</sup>

Legal experts who have studied the two cases generally agree that the stand-alone check-offs – i.e., those covered in this report – are more likely to be vulnerable to challenges than the promotion activities that are 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

---

<sup>3</sup> *Glickman v. Wileman Bros. & Elliot, Inc.* 521 U.S. 457, 477 (1997).

<sup>4</sup> *United States v. United Foods, Inc.* 533 U.S. 405, 412 (2001).

is needed to provide protection against such challenges. Another issue not addressed by the most recent Supreme Court ruling, these experts noted, was whether the speech compelled under the check-offs could be deemed “government speech,” which was more likely to pass Constitutional muster.

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.

This latest Supreme Court action 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. It ordered all beef assessments to cease on July 15, 2002. The U.S. Department of Justice, on behalf of USDA, was granted a stay of the order by the 8<sup>th</sup> Circuit Court of Appeals so that the program can continue while the government appeals the decision.<sup>5</sup>

## 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 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

---

<sup>5</sup> Other lawsuits against the dairy and pork programs are pending in the courts. Lengthier discussions of the check-offs’ legal aspects can be found in the July-August 2001 issue of *The Agricultural Law Letter* published (at [www.agriculturelaw.com](http://www.agriculturelaw.com)) by the law office of McLeod, Watkinson, & Miller, which has assisted groups to establish check-off programs; and in *Promotion Checkoffs, Why So Controversial? The Evolution of Generic Advertising Battles* (September 2001) by John M. Crespi, available from Cornell University’s National Institute for Commodity Promotion Research and Evaluation.

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 conducted 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. In addition, USDA will conduct a survey in June 2003, and if 15% of producers and importers favor a binding referendum, it will be held within one year.

## 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 charge that producer dollars are often spent on lavish entertainment of clients or on other activities they consider inappropriate—and that the agency has 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.

Nonetheless, Secretary Glickman in December 1998 named a Department-wide task force to review the AMS oversight guidelines and related policies, and to suggest changes. The task force made its final recommendations at its last formal meeting on January 2, 2001, but neither Secretary Glickman nor his successor had acted on them as of mid-2002.

**Program Effectiveness.** Economists have stepped up research into 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:

Just because it is possible to provide empirical evidence that the producer benefits are positive for some commodities does not necessarily mean that benefits will exceed costs for all commodities, for any level of expenditures, or for all types of programs. The magnitude of the benefits 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.<sup>6</sup>

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 5 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 national trade association, or where a national trade association receives contracts from the check-off board to carry out some “permitted” activities. “There is potential for cross-subsidizations when commodity programs are closely linked to industry trade associations through board memberships or cooperative efforts,” Armbruster and Nichols wrote.

**Commodity “Cannibalism”.** As more generic promotion programs 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 generic promotion convinces consumers to drink more beef, will they eat less pork or chicken? (This is one reason many of the programs increasingly focus on overseas markets where potential new demand is greatest.)

**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 international ones. Increasingly, importers are being required to pay assessments, but also are being given seats on governing boards.

---

<sup>6</sup> 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 commissioned, but results are not expected until 2003, 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.