

# 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

The U.S. Supreme Court recently affirmed the constitutionality of the so-called beef check-off program, one of a number of generic promotion programs for beef and other agricultural products that Congress has authorized in recent decades. 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. Various challenges in the federal courts to end the programs had met with some success, and the Supreme Court’s decision to uphold the beef check-off is considered significant for the future of the other programs. This report will be updated if events warrant.

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 boards who run the programs must reimburse AMS for such costs.<sup>1</sup>

Federally sanctioned programs collect assessments for 16 commodities: **avocados** (implemented in 2003; \$16.3 million collected in the first nine months of FY2004), **beef** (\$45.9 million collected in FY2004), **blueberries** (\$1.3 million), **cotton** (\$55 million), **dairy products** (\$87.1 million), **eggs** (\$18 million), **fluid milk** (\$103.2 million), **honey**

---

<sup>1</sup> 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 both generic promotion programs and their requirements, and on those associated with marketing orders, see the USDA-AMS website at [<http://www.ams.usda.gov/>].

(\$3.6 million), **lamb** (\$2.5 million), **mushrooms** (\$1.8 million), **peanuts** (\$6.7 million), **popcorn** (\$600,000), **pork** (\$59.1 million), **potatoes** (\$8.6 million), **soybeans** (\$44.2 million), and **watermelons** (\$1.5 million).<sup>2</sup> 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 *Pork: The Other White Meat* 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 ten U.S. farmers were contributing to one or more of these efforts by the mid-1990s.<sup>3</sup>

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 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.

---

<sup>2</sup> Source: USDA Budget Explanatory Notes for FY2006. Reflects amounts that go to national boards. Some programs collect additional sums but return them for state-level activities.

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

## Supreme Court Cases

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 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>4</sup>

However, 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 6<sup>th</sup> 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 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>5</sup>

---

<sup>4</sup> *Glickman v. Wileman Bros. & Elliot, Inc.* 521 U.S. 457, 477 (1997).

<sup>5</sup> *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 such as research into mushrooms’ health and nutritional attributes.

The Supreme Court issued its most recent 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 8<sup>th</sup> Circuit Court of Appeals announced that it would not reconsider the district court’s ruling. The federal government appealed to the Supreme Court, which heard oral arguments on December 8, 2004.

On beef, the federal 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).<sup>6</sup>

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. It observed that “the beef advertisements are subjected to political safeguards more than adequate to set them apart from private messages”:

The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions’ content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses key personnel, and retains absolute veto power over the advertisements’ content, right down to the wording. And Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time. No more is required.<sup>7</sup>

In a May 23, 2005, press release, Secretary of Agriculture Johanns said that he was pleased with the decision. He added that the beef check-off will continue without interruption and that the department is studying the legal implications for other check-offs

---

<sup>6</sup> *Johanns v. Livestock Marketing Assn. and Nebraska Cattlemen v. Livestock Marketing Assn.* (Nos. 03-1164 and 03-1165).

<sup>7</sup> *Ibid.*

that are being challenged on constitutional grounds. 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.

## Outlook for the Programs

The Supreme Court beef ruling could be cited in defending other mandatory check-off programs from First Amendment challenges. For example, on October 25, 2002, a federal district court 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. On October 22, 2003, a three-judge panel of the Sixth Circuit Court of Appeals agreed with the lower court's ruling. Cases also are at various stages in the federal courts on other commodity check-offs.<sup>8</sup>

Check-off supporters had been considering alternatives in case of an adverse Court ruling. These included enacting more state-authorized check-off programs, possibly with language permitting producers to request refunds; placing promotion within a broader marketing order using the Agricultural Marketing Agreement Act of 1937; establishing all-voluntary programs; requiring assessments only for research but not promotion activities; or seeking alternative (e.g., general Treasury) funds for commodity promotion. Each of these alternatives has perceived strengths and weaknesses; some could require statutory changes.

It is possible that check-off opponents could continue to challenge other legal aspects of the programs in the courts, and/or redouble efforts to change USDA rules or the legislation itself. As the Supreme Court noted, Congress retains final oversight and statutory authority. It remains to be seen whether check-off advocates also will continue to examine the need for, and seek, any statutory changes, particularly those aimed at withstanding any future legal and legislative challenges.<sup>9</sup>

---

<sup>8</sup> See also "Ruling will likely impact other pending checkoff cases," AgWeb.com, May 24, 2005.

<sup>9</sup> For more information, see Clement E. Ward and Robert J. Hogan Jr., "Beef and Pork Checkoffs: Challenges, Impacts, Alternatives," a fact sheet available through the Oklahoma State University Division of Agricultural Sciences and Natural Resources website, at [<http://www.osuextra.com>]. Also see 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, available at [[http://aem.cornell.edu/special\\_programs/commodity/nicpre/bulletins/rb0104.pdf](http://aem.cornell.edu/special_programs/commodity/nicpre/bulletins/rb0104.pdf)].