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**Public Policy for Achieving  
Market Growth  
Through Generic Commodity Promotion  
and Research Programs**

## Federal Legislation and Producer Checkoff Programs

Wayne R. Watkinson  
McLeod, Watkinson & Miller

For the past forty years, commodity checkoff programs have operated with funds contributed by producers. Over the last half century, several sectors of the agricultural industry have recognized the need to promote their products and have sought legislation authorizing a checkoff program for their producers. As a result of the rapid development of the commodity promotion and research field, several issues have emerged that impact the manner in which these programs are operated and will be operated in the future.

### Background

The checkoff concept for agricultural commodities began to appear in the early 1920s. Voluntary checkoffs (normally by processors) were used to fund basic promotion activities. Prior to 1966, most activities were either voluntary or state legislative efforts. The initial federal statute authorizing funding of a promotion and research program through producer assessments based upon the sale of a commodity was the Cotton Promotion and Research Act passed by Congress in 1966. Prior to that, the Wool Act had assessed producers, but the Wool Act had authorized the payment of the assessment from support payments paid under the Wool Act. Therefore, the producer was not directly assessed on the sale of the product.

### Types of Programs

#### Voluntary Versus Legislative

There are two basic types of checkoff programs: 1) voluntary checkoff and 2) legislative checkoff. Voluntary checkoffs involve industry members funding certain activities by agreeing to "contribute" funding for a common purpose. Funding is not mandatory unless there is some punitive action that can be taken due to contractual commitments (e.g., membership agreements). Legislative checkoffs involve the passage by a government entity (state or federal) requiring defined persons (e.g., producers) to pay (and possibly others to collect and remit) assessments on the marketing (some other act) of a particular product (or service.) Legislative checkoffs are normally state-wide or national in scope. They may include provisions for refunds or they can be entirely mandatory (no refunds).

#### Types of Legislative Programs

Legislative checkoff programs for agricultural commodities have followed three tracks toward fruition. Market promotion activities may be included in marketing orders under the federal Agricultural Marketing Agreement Act of 1937 (AMAA).<sup>1</sup> A recent review indicated that thirty-nine of the forty-four marketing orders in existence contain provisions under which research and

development activities could be carried out and eighteen specifically authorize the use of funds for generic advertising. One recent order—that for Vidalia onions adopted in January 1990—provides *only* for production research and market promotion projects.

Checkoff programs may also be authorized under state statutes. Many of these have been in place for years. There are two types of statutes in use on the state level: 1) statutes that authorize a program for a specific agricultural commodity; and 2) statutes, general in form, that permit any agricultural commodity or agricultural products group to set up a program. For example, states with specific commodity statutes include—among many others—Florida for citrus fruit; Idaho for prunes, hops, honey, edible beans, dairy products and beef; and Iowa for dairy products, beef, turkey, soybeans and corn. States with general authorizing statutes include Michigan, Minnesota, New Jersey, Ohio, Pennsylvania and Texas.

The third and most common approach today is to use a federal commodity research and market promotion statute specifically tailored to the needs and particular interests of the proponents of the particular commodity research and market promotion program.

There are currently eighteen commodity-specific statutes that specifically authorize national promotion and research programs (See Appendix I).

### Commerce Clause Authority

While many people believe that the federal authority used to establish a checkoff program is the taxing power, the actual authority relied upon by Congress is granted under Article I, Section 8 of the United

States Constitution “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” The philosophy behind the use of the Commerce Clause to enact checkoff legislation is that 1) the production, processing and marketing of a product is an important activity within the United States, 2) the product moves with the channels of interstate and foreign commerce, and 3) even products that do not move in foreign or interstate channels directly burden or affect interstate commerce. If you review all of the checkoff legislation that has been enacted in the past forty years, you will find congressional findings and declaration of policy that include legislative findings that the commodity in question meets the three elements listed above.

### Program Characteristics

Each statute authorizing the creation of a checkoff program contains general provisions that define the boundaries of the program and reduce the risk of successful challenge.

For example, in order to reduce the risk that a statute will be challenged on the grounds that Congress has improperly delegated its legislative authority to the executive branch it is necessary to establish a maximum rate of assessment, and the assessment procedure, and to carefully define the product to be assessed .

In general, each statute includes provisions describing the following elements:

1. A governing body to oversee the collection and expenditure of funds.
2. An assessment mechanism and collection procedure.
3. The specific rate of assessment or

- maximum rate that can be imposed.
4. The specific activities which are authorized.
  5. A definition of the product that is to be assessed, including whether imports of that product are to be assessed.
  6. An enforcement procedure to ensure collection of assessments.
  7. A rule making procedure for developing an administrative order.
  8. The authority for the secretary to implement the order.

Once the legislation is passed, authority is provided through the legislation for the secretary of agriculture to issue an order implementing the program. This order is developed through a rule making process. There are two types of rule making processes. One is a formal rule making process. The second is the informal rule making process that does not require a hearing on the record and is much less time consuming. Most of the recent checkoff programs have opted for the informal rule making process.

### **Marketing Agency Versus Government Agency**

The logical place to review the philosophy underlying checkoff programs is with the nature of the commodity checkoffs themselves. Over the years, commodity checkoff programs have changed with regard to both their structure and their authorizing legislation. Each of these programs has enabling legislation authorizing certain activities and the collection of assessments from producers (or processors). Statutes set out the specific authority within which each commodity promotion program must operate. However, there is a philosophical issue that must be

addressed. That is, what is the nature of these organizations?

In establishing these programs, Congress has authorized an industry to *assess itself* to conduct promotion and research activities. Each law grants the U.S. Department of Agriculture (USDA) the responsibility for overseeing these programs. Each party (the industry and USDA), therefore, has a specific role relating to the checkoff program. The industry has a responsibility to fund, govern and operate the checkoff program. There does not appear to be any disagreement that the industry decides how to spend its funds, provided that they do so within the authority of the authorizing legislation. They develop budgets, plans and projects and even contracts to implement those plans and projects, all with the approval of the secretary to ensure compliance with the act and order.

Litigation has provided some insight into the nature of the speech espoused by these boards in their promotional activities. In United States v. Frame<sup>2</sup>, the only challenge to free-standing promotion program to reach the federal appellate courts, the Third Circuit Court of Appeals recognized that the speech espoused by the Beef Board was not government speech at all—it was commercial speech. The Beef Board did not articulate a government view, but an industry view. In fact, the government did not seek to espouse an official view at all, but to merely allow the industry to promote its products.<sup>3</sup> Accordingly, the speech emanating from these commodity boards is not a government voice, but an industry voice. Because it is not government policy, nor government speech, USDA's role in overseeing these programs is merely to ensure that a commodity board does not exceed the

authority provided by its enabling legislation.

Still, questions have been raised regarding whether additional safeguards are necessary to oversee the activities of these boards. The Federal Trade Commission has jurisdiction over all advertising that runs on commercial broadcast stations including advertising by these programs. The Food and Drug Administration has jurisdiction over health claims made with regard to the food products promoted by these commodity boards. USDA is vested with authority to approve (or not approve) all projects undertaken by these boards. These safeguards are adequate to address issues such as false or misleading messages or claims relating to promotion of the products. *Additional safeguards are not required.* Issues relating to whether certain activities are authorized (e.g., recent advertisements promoting conservation by cattlemen) fall within the jurisdiction of USDA's oversight. They can, and should, be addressed in that manner.

### **Prohibition on Influencing Governmental Action**

In view of the fact that the type of speech espoused through these programs is commercial speech, the types of activities that may be conducted must be viewed in that context. These are promotion programs, not government programs or trade associations. Nevertheless, the issue relating to influencing governmental action places several activities within the proverbial "gray" area due to the significant influence government has on the markets of most products.

Policies by USDA that inhibit or restrict

the speech of these promotion programs should be minimized since extensive regulation of such speech may shift the type of speech from commercial to governmental. It is a recognized fact that these commodity checkoff boards are not trade associations. They were not intended to decide policy issues for the industry. They are the marketing agencies for the industry and were created to promote and research the industry's products. In fact, the legislation authorizing each promotion program includes a provision that prohibits the board or governing body from expending funds to influence governmental action. What is the nature of this prohibition; what is its intent; and how can it be interpreted to allow the commodity checkoff board to carry out its mandate to market its industry's products, while avoiding those areas prohibited by Congress?

### **Interaction with Government Agencies**

One of the areas in which the prohibition on influencing government action creates the most friction relates to commodity boards' interaction with government agencies. Obviously, government agencies have a tremendous impact on the marketing of an industry's products. Grade and quality standards, inspection, labeling and standards of identity are all issues that impact the marketability of an industry's product. If the commodity checkoff boards are mandated to maintain and expand the use of these products, and government regulation has such a significant impact on the marketability of those products, marketing agencies must be able to interact with the government on marketing issues affecting their product. This is not to say that commodity boards should be authorized to advocate a particular

position on a policy issue, such as labeling, approval of bST or other policy issues that have impacted the marketing of a product. However, commodity checkoff boards must ensure that decisions that impact the marketing of a product are based upon accurate information to ensure that the decision is well founded and in the best interests of the industry.

Some may ask, who protects the consumer if the industry commodity boards are able to provide information on policy issues? The consumer is well protected through organizations such as Public Voice, Center for Science in the Public Interest, and other consumer-oriented organizations. A better question, perhaps, is who protects the industry if these commodity boards cannot expend funds to provide factual information on these critical issues? In many cases, trade associations that normally protect the interest of an industry lack sufficient funds to generate the information in question. Each party's (consumer and industry) interests need to be represented and the best arguments and information must be put forward. Commodity industries to date have not fully utilized the resources they have at their disposal to provide information. It is important that the industries that fund these checkoff programs be represented to the fullest extent.

This brings us to a related issue, the commodity board's role in providing information to the industry on marketing issues affecting their product. It is said that unless you provide a product consumers want, they will not buy your product. Unless producers produce beef that meets the palatability and health concerns of individuals, they will move to another product. If consumers perceive milk as unwholesome or tainted, they will move to another product. If marketing a product begins with producing a

product consumers want, as a marketing agency on behalf of the industry, the checkoff boards clearly have the responsibility of helping the industry identify and produce the products that will most likely increase the marketability and sale of that industry's product. Some of the issues relating to product composition and production are controversial and cause great emotion. Yet this does not negate the need for information to be provided to the industry on those issues. While the industry may disagree over bST use, or new grading standards for beef, or blending of cotton and polyester, information relating to those issues must be provided so decisions relating to that product can be made by individual producers. Sometimes the information provided to the industry may not be received enthusiastically. However, that does not relieve these commodity boards from improving the marketing conditions for the industry's products they represent.

### **Philosophical Change in Congress Toward Checkoff Programs**

#### **Refund Versus Mandatory Assessments**

The processes available to producers and others to challenge the imposition of commodity promotion and research assessments has become more active due to the modification of these programs to remove many of the "safeguards" protecting those who do not wish to participate in the programs. Prior to 1983, producers had had the right to request refunds should they not support a program aimed at promoting or researching their product.<sup>4</sup> In 1983, Congress passed the Dairy Promotion and Research Act<sup>5</sup> which authorized a program that assessed every dairy producer in the United States fifteen cents per hundredweight of milk marketed.

This program was significant in that it provided a number of features that virtually all previous programs did not:

1. The program contained *no refund provision* for people who did not wish to participate in the program.<sup>6</sup>
2. The program provided for a delayed referendum that allowed the program to go into place prior to the referendum being conducted to determine support for the program.
3. The program authorized "representative" or "bloc" voting by cooperatives on behalf of producers.
4. The program provided a credit for producers to participate in state and regional programs and to receive a credit for that participation with regard to the federal assessment.

The justification for the imposition of the dairy program was to allow producers to fund promotion and research to reduce the burgeoning surplus of dairy products purchased by the government. Since the intent of this program was to remove surplus dairy products from the market and all producers participated in that surplus, there should be no refunds authorized since all people should pay an equal share. This philosophical change in the intent of these programs had a profound effect on programs which were developed two years later in the 1985 farm bill. The main programs implemented through that farm bill (the beef and pork checkoff programs) were proposed by their respective industries without refund provisions. Furthermore, the programs would be implemented prior to a referendum.

During the legislative process, opponents to the beef and pork programs garnered sufficient support to require that refund provisions be included at least for the period prior to the referendum.<sup>7</sup>

It is important to note the subtle shift in philosophy that justified mandatory participation in the programs. During the deliberations on the dairy bill, it was argued that the surplus was the responsibility of the industry to remove, and therefore all persons participating in the industry should pay their fair share. The variation on that argument used by the beef and pork industries was that the burden of the industry *and the benefits of the program* may fall on all in the industry. Therefore, all in the industry must participate mandatorily in the program.

With the passage of the beef and pork legislation there was a slight shift back to protecting the interests of persons who might not want to participate. For example, the 1990 legislation for other commodities, namely mushrooms and fluid milk, required a referendum in each case before assessments for these programs of research and promotion could begin.<sup>8</sup>

Along with the concern that referenda be held prior to beginning a promotion program, or that at least refunds of assessments be allowed until a referendum has been held, is the desire of producers to have recall referenda. All of the federal statutes adopted in 1990 authorizing new commodity programs for soybeans, mushrooms, limes, pecans and fluid milk have such provisions. All but one require a recall referendum if requested by at least ten percent of those being assessed. Provisions such as these evidence a trend toward broadened producer control over these programs. There also appears to be a trend toward mandatory periodic (e.g., every five years) reconfirmation referenda.

### Governance Changes

Other subtle changes in the philosophy of these programs were also starting to take shape. Prior to the development of the beef



and pork legislation, these programs have been governed by a board of industry representatives appointed by the secretary. The exception to that was the Wool Act, which authorized the secretary of agriculture to contract with a "certified" organization. This certified organization was a trade association representing the sheep industry. The cotton legislation essentially required a Cotton Board to contract with another organization to implement the program (Cotton, Inc.) However, both the pork and beef programs broke new ground with regard to the governing bodies implementing the program. The pork legislation authorized a complex election process to create a board of delegates that then elected a Pork Board. This Pork Board was directed for the initial three years of the program to provide a set amount of funding to a private organization (the National Pork Producers Council).<sup>9</sup>

The beef legislation made attempts to ensure that the Cattlemen's Beef Promotion and Research Board, the administrative body responsible for implementing the program, would work very closely with industry organizations to implement the program. In addition to the Cattlemen's Beef Board, it established a Beef Promotion Operating Committee that was comprised of ten representatives elected by the Beef Board and ten representatives elected by a "federation of state beef councils".<sup>10</sup> Furthermore, the Beef Promotion Operating Committee was granted the authority to enter into contracts to implement programs only with national, non-profit, industry-governed organizations.<sup>11</sup> This effectively limited the Operating Committee to contracting with a limited number of national industry organizations to implement its budget. It is during this process that the "self-help" nomenclature for

these programs became popular. These were touted as programs paid for by the industry to help the industry market its products.

### Informal Rule Making

One of the more obscure, yet dramatically important, modifications that was made to the dairy, beef and pork programs was the removal of the requirement that the administrative phase of these programs be conducted through "formal" rule making. Programs developed prior to 1983 required a "formal" rule making procedure. Under formal rule making, it was necessary that the USDA conduct extensive hearings on the record throughout the United States to allow all persons affected an opportunity to present their views. The dairy, beef and pork legislation required only "informal" rule making, rather than "formal." The distinction is significant. This "informal" rule making process is much less demanding and does not require a full hearing *on the record*. In fact, USDA now generally conducts an open forum "town meeting" at which all parties can come and present their views. The legislation also set a time period within which the program must be implemented. Informal rule making provided an additional benefit—because hearings on the record were not necessary for the development of the administrative order, the *ex parte* communications prohibitions were greatly relaxed. Industries could begin to work with USDA personnel to develop the programs in a much more cooperative atmosphere without the heavy regulatory hurdles that are intrinsic to the formal rule making process. This allowed orders to be developed that more closely reflected industry desires and needs.

## Expansion of Activities

One of the areas in which Congress has made rapid changes in commodity promotion programs is the area of authorized activities. In the early programs, the concept behind the boundaries of the activities was to improve promotion and research of the product. However, as industry became sophisticated, it became necessary for these programs to expand the breadth of their programs into new areas. For example, many of these programs are called "generic checkoff programs" because they do not authorize the expenditure of funds on brand advertising. The dairy legislation passed in 1983 was silent with regard to the type of advertising authorized. In the order, provisions were included that allowed the board to fund branded programs under certain conditions. The National Dairy Board has used this authority to expand the category of dairy beverages by enhancing the market penetration of yogurt/juice combination drinks. Research has been conducted in the beef program relating to the marketability of a branded program for beef funded with checkoff assessments through the National Livestock and Meat Board. These efforts are designed to increase the marketability or expand the number of products that historically have not been sold as a branded product.

Branded promotion was not the only expansion of activities. The beef program includes a new program definition that authorizes a wide array of activities. The term "industry information" is defined in the beef legislation as "information and programs that will lead to the development of new markets, marketing strategies, increased efficiency, and activities to enhance the image of the cattle industry."<sup>12</sup> A development of this new program area has allowed

the beef industry to expand into environmental messages, issues management and image enhancement activities which are focused not on beef specifically, but on the cattle industry as a whole.

The third area in which activities have been greatly expanded is in the area of export marketing. Until the Soybean Promotion and Research Act was passed, most of the commodities that operated a checkoff program were not major exporters of the commodity. Soybeans, on the other hand, were a commodity over half of which was exported in either bean, meal, or oil. This presented different challenges for the industry when it moved to have its checkoff program authorized. Until 1990, commodity promotion programs had been limited in what they could do to influence governmental action. That included foreign governments as well as the United States or state governments. The soybean industry felt it was necessary to achieve a liberalization of that policy since most of its foreign buyers were government agencies. Through industry efforts, Congress acknowledged the need for direct contact with foreign government officials under the soybean program. Therefore, it included in the legislation an exception to the prohibition on influencing governmental action for "any action designed to market soybean or soybean products directly to a foreign government or political subdivision thereof."<sup>13</sup>

What is the significance of these changes that have taken place over recent years? In the typical situation, Congress, in its authorization of these programs, is presented by an industry with a proposed checkoff program that stretches a little bit further the authority that was last approved by Congress. Arguments presented to Senate and House committee staff in developing the legislation indicate that the authority in the

proposal is consistent, albeit a bit broader and more flexible, with that which was approved in previous checkoff legislation. If these trends continue, it is likely that checkoff legislation proposed by the industries seeking checkoff programs in the 1995 farm bill will expand even further the provisions of prior checkoff programs, thereby increasing the circle a little wider.

The expansion of authority within these programs does not take place only in Congress. The USDA is responsible for overseeing the activities conducted by these commodity boards. It is difficult to establish with any degree of specificity the exact boundaries of authority for any program. Therefore, in many cases, if activities are approved or authorized under one program, commodity boards that are subject to different legislative authority may be granted that authority since USDA will attempt to provide consistency with regard to its determinations as to what programs are authorized or not authorized to do. Therefore, the expansion of authority in the beef and pork programs has had the indirect effect of expanding the authority under the dairy and cotton programs. This is not to say beef and pork authorized assessments on imports have not resulted in the dairy program's being expanded to include imports. However, in those areas in which there are less finite issues relating to boundaries, expansion of the authority of that board is bound to happen. This is a result of the philosophy and perspective which those providing the oversight currently hold. It is not uncommon for programs to experience a down-sizing of authority when new USDA personnel are hired to oversee the program. This has occasionally happened and requires the commodity board to reestablish that authority over a period of time.

Recently, some members of Congress have raised questions about whether the authority for these programs has gone too far. Hearings were recently conducted that focused on activities of the beef program, which some in Congress allege were attempts to influence Congress with regard to grazing fees as opposed to promoting consumption of beef. This raises questions about the role of Congress and USDA in policing these checkoff programs. Commodity checkoff programs are developed by an industry to allow an industry to promote and research its products to make them more marketable. This is both the stated purpose of these programs and the intent of Congress in passing them. Congress and USDA are important vehicles in ensuring that Congress' intent is maintained through the implementation of the program. It is important to note once again in this context that the speech which these programs assert is commercial, not governmental or political. This was a cornerstone of the U.S. v. Frame decision.<sup>14</sup> When the language of these boards changes from commercial speech (marketing a product) to political speech (advocating a political position), these programs become vulnerable to challenge both from within the industry and from external forces.

#### Processes for Legal Challenges

There are four different ways in which opponents to a particular checkoff program typically assert their opposition to it: 1) during the legislative process, when Congress considers the merits of enacting a checkoff program in the first place; 2) through the referendum, when members of the regulated agricultural sector determine whether a temporary order becomes permanent, 3) recalls or re-authorizing referenda; and finally, 4) through the courts, by raising

legal challenges to the legislation once it has been enacted and approved.<sup>15</sup>

Legal challenges to federal commodity legislation are most easily understood and explained as essentially challenges to acts of Congress in regulating the agricultural industry. Before a particular piece of checkoff legislation has been passed into law, opponents of the proposed statute have available to them the wide range of strategies employed by lobbyists to influence the will of Congress. On the other hand, once the statute has been passed into law, opponents to the legislation have available to them the much narrower and more formalized range of legal arguments which can be brought against congressional actions in a court of law.

Almost all challenges to federal checkoff legislation have claimed that Congress has stepped outside the U.S. Constitution's procedural and substantive boundaries when it enacted the challenged legislation. These challenges to legislation have been largely unsuccessful due in part to the judiciary's traditionally deferential approach to commercial legislation, and the accompanying presumption that Congress acts lawfully in carrying out its legislative powers.

A full range of procedural and substantive constitutional challenges were brought against the Beef Promotion Act, and rejected by the Third Circuit Court of Appeals, in *U.S. v. Frame*.<sup>16</sup> While other challenges have been brought in federal and state courts against a variety of federal and state commodity support statutes, the *Frame* decision remains the most thorough single discussion to date of the range of legal challenges to be made against federal checkoff legislation.

The procedural arguments raised against federal checkoff programs are not only less interesting than the more substantive challenges, but tend to be disposed of relatively

quickly and easily by the courts. The argument here is essentially that a piece of checkoff legislation exceeds Congress' specific constitutional authority to regulate activities affecting interstate commerce. Challengers argue that the Constitution does not confer upon Congress the power to establish the sorts of programs contained in checkoff legislation or, in turn, to empower the USDA to carry out the provisions of those statutes. These challenges include arguments that there is no "activity" being regulated by the statutes, that the statutes do not "regulate" commerce, and that the assessments imposed under these programs are unconstitutional "taxes."

Claims that a law is an invalid regulation under the Commerce Clause are not likely to be successful. "A regulation of commerce includes a congressional attempt to bolster the public image of a product in order to increase consumer demand."<sup>17</sup> Promotion and advertising, research, consumer information and industry information are "rationally related" to the maintenance and expansion of national agricultural markets.<sup>18</sup>

Referendum provisions have been subject to separate challenges, which have also been unsuccessful. The requirement of a favorable referendum vote has been found in itself to be a valid condition imposed by Congress for the continued implementation of a federal checkoff statute.<sup>19</sup> The Dairy Act and Order permit bloc voting in the referendum, as do several marketing orders enacted under the AMAA. Bloc voting is a procedure in which cooperatives are authorized to cast votes on behalf of their members. Bloc voting has been the subject of several unsuccessful challenges on grounds that it restricts the fundamental right of members to vote. Challengers have argued that bloc voting forces dissenting members of cooperatives to vote against their wishes,

and unfairly strengthens the vote of those who agree with the cooperatives' position. However, courts have rejected these claims by finding that dissenting members are still free to either make their views known to the cooperative, or to withdraw and vote independently.<sup>20</sup> Bloc voting is discussed in greater detail below.

"Substantive" arguments are based on those provisions of the Constitution that limit Congress' power to intrude upon specific rights possessed by each individual, in particular, the First and Fifth Amendments. It is the argument that federal checkoff legislation violates the individual's First Amendment rights that has received the most attention and has generated the most careful analysis by courts. Indeed, the only successful constitutional challenge to a promotion program to date has been on First Amendment grounds (Cal-Almond, 14 F.3d 429 (9th Cir. 1994)).

The First Amendment may be violated not only when the government prohibits particular speech or association with particular groups, but also when the government *compels* particular speech or *forces* an association with particular speech. These principles have been established through well-publicized challenges to legislation banning flag burning, requiring particular slogans on license plates, or requiring school children to salute the flag. Opponents to federal checkoff legislation have relied on such precedents to argue that the mandatory assessment provisions of commodity programs, which fund efforts to promote a particular commodity, impermissibly compel them to engage in particular speech and to associate with a particular group.

A First Amendment challenge, of course, requires an initial showing that First Amendment rights are implicated by the challenged statute, i.e., that the checkoff

legislation in fact compels speech and association with a group with which the challenger disagrees. Courts have found a sufficient impact on speech and associational rights in the mandatory assessment provisions of checkoff legislation, whereby producers are compelled to contribute financially to funding promotion for their commodity. In making such arguments, however, challengers to checkoff legislation find themselves in the implausible position of saying that they disagree with the promotion of their own product.<sup>21</sup>

Once a court determines that the First Amendment interests of the individual are affected by the checkoff legislation, the court weighs those protected interests against the interests of the government in regulating the agricultural commodity through the challenged legislation. In making this analysis, the Third Circuit in Frame held that the Beef Promotion Act satisfied even the strictest of review possible under First Amendment, finding an "ideologically neutral" purpose behind the legislation, and noting that the assessments were only being used to promote a commodity that the producer had already chosen to market.

A marketing order challenged on First Amendment grounds in the Ninth Circuit met with different results. In Cal-Almond v. U.S. Dept. of Agriculture<sup>22</sup> almond growers successfully argued, on First Amendment grounds, that the credit-back provisions of that particular marketing order did not directly advance the state's desire to increase sales of almonds generally.<sup>23</sup> The court was not persuaded, based on evidence in the record, that the program's use of the assessment funds was sufficiently effective in comparison to the vigorous marketing efforts already underway by almond processors themselves. However, due to the very specialized, industry-specific issues present-

ed to the Ninth Circuit in Cal-Almond, it remains unclear whether its reasoning will provide support for subsequent First Amendment challenges to other federal checkoff programs.

The Fifth Amendment is relied upon for arguments that federal checkoff programs violate the due process clause of the constitution, and involve a "taking" of private property without a public purpose or just compensation. The Third Circuit found several rational bases for the imposition of assessments on cattle producers, noting the administrative efficiency, the fact that the producers benefit the most from the effects of the legislation, and that they are in a position to pass the expense on to others in the industry. Likewise, the Third Circuit found that there was a sufficiently public purpose expressed by Congress for the Beef Act and the regulation of the beef industry, defeating any argument that assessments under the act were an improper "taking" of funds for a private purpose.

Challengers have also argued that the assessment provisions of federal checkoff legislation unfairly discriminate among producers who must pay the assessment. Such "equal protection" challenges, too, are typically rejected.

Due to the mandatory nature of the checkoff programs, it is likely that more disgruntled industry members and third parties which are affected by the activities of the checkoff programs will file suit in the future to challenge these programs.

### **Bloc Voting**

As noted above, bloc voting provisions allow cooperative associations to play an important role in assessing the regulated

industry's support for a marketing or promotion order, and in determining whether or not the industry chooses to continue to be regulated by its marketing order. In keeping with the "self-help" spirit of agricultural marketing orders and checkoff programs, bloc voting provisions are an example of the federal government's intent to regulate the agricultural industry in the most efficient manner possible by encouraging the industry to manage the marketing of its own products.

Bloc voting provisions are found in the Agricultural Marketing Agreement Act of 1937, and the Dairy Promotion and Research Order. Such provisions allow cooperative associations to vote on behalf of their members in the conduct of a referendum. The association votes either for or against continuation of the program, and that vote is counted as the vote of each of its individual members. As in the case of Cecelia Packing v. U.S. Department of Agriculture,<sup>24</sup> in which plaintiffs challenged Sunkist's vote on behalf of its members in favor of continuation of the navel orange and valencia orange marketing orders, bloc voting may have a significant impact on the outcome of a referendum. Since Sunkist represented about eighty percent of those orange industries, its vote meant in effect that eighty percent of the producers affected by those orders were counted as supporting continuation of the marketing orders.

Bloc voting provisions explicitly recognize the existence of cooperatives as representative organizations, and implicitly acknowledge their importance and value in promoting and maintaining the vitality of interstate agricultural commerce. These provisions are more than simply procedures for ensuring administrative efficiency; they represent strong federal encouragement for

the formation of and long-term vitality of cooperative associations as stabilizing forces in the agricultural industry. The history of expressed congressional support for cooperative organizations has been relied upon to successfully defend from legal challenge bloc voting procedures, and the role carved by Congress for cooperatives in deciding the future of marketing orders.<sup>25</sup>

As early as 1922, Congress attempted to strengthen the marketing effectiveness of cooperative associations by passing the Capper-Volstead Act<sup>26</sup> which "removed from the proscription of the antitrust laws cooperatives formed by certain agricultural producers that otherwise would be directly competing with each other in efforts to bring their goods to market." In 1929, Congress passed the Agricultural Marketing Act, in order to promote and stabilize interstate and international marketing of domestic agricultural products.<sup>27</sup> That goal was to be achieved specifically by

encouraging the organization of producers into effective associations...under their own control for greater unity of effort in marketing and by promoting the establishment and financing of a farm marketing system of producer-owned and producer-controlled cooperative associations and other agencies.<sup>28</sup>

Eight years later the Agricultural Marketing Agreement Act of 1937<sup>29</sup> was passed "in response to unstable marketing conditions during the Depression, with an objective of helping farmers obtain a fair value for their agricultural products."<sup>30</sup> The AMAA specifically instructs the secretary of agriculture to recognize and encourage cooperative associations in order to promote efficient methods of marketing and distribution.

The AMAA contains bloc voting provision which has governed the conduct of referenda on marketing orders issued pursuant to that law. According to that provision the secretary shall consider the approval or disapproval by any cooperative association of producers...as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.<sup>31</sup>

Significantly, while this provision applies to all marketing orders through the AMAA, the dairy industry is the only industry regulated by federal checkoff legislation that contains a bloc voting provision.<sup>32</sup> More than any other industry governed by checkoff legislation, the dairy industry has seen an historical development of cooperatives and a corresponding reliance on those cooperatives in the marketing of milk. The inclusion of a bloc voting provision in the Dairy Order reflects not only the attention paid to the needs of the particular industry in drafting marketing orders, but an underlying federal encouragement of cooperative associations whenever appropriate.

Bloc voting can therefore best be understood not only as recognition by Congress of the role played by cooperative associations in the marketing of agricultural products, but as a federally created incentive for producers to join cooperative associations. By providing an advantage to growers who choose to join together in a cooperative association, the federal government can engage in industry support while imposing on the industry a minimum of direct federal regulation. Bloc voting allows the cooperative association, as the marketing agency of those for whom it votes, to speak on behalf of its members regarding the comprehensive, national marketing and promotion program for the industry's product.

## Conclusion

In view of recent events such as the General Agreement on Tariffs and Trade and the reduction in funding for the Market Promotion Programs, commodity checkoff boards are going to feel a greater level of pressure to provide more diverse marketing services for their industries, both domestically and internationally, than ever before. This pressure will lead industries to become more aggressive both in the marketing activities they conduct and in the manner in which they operate promotion programs. The pressure to achieve results and increase marketing services for the industries will generate a greater level of friction both within the industries and with the USDA and Congress. This situation, coupled with the forecast of continued high supply in several of the commodities that have promotion programs, will generate additional challenges to the operation of these programs.

This will not deter additional industries from seeking promotion and research programs to benefit their industries since fewer and fewer options are available to generate funding to market products cooperatively. I believe commodity checkoff programs will become popular not only for food-related commodities, but for industries, such as forestry and water resources, that have faced an onslaught of environmental issues. Service industries may also begin to view checkoff programs as a viable means to promote their services, both domestically and internationally.

The recent shift to a Republican majority in both houses of Congress will present a more business-oriented agenda that will benefit existing checkoff program operations and new checkoff opportunities. These programs will be viewed increasingly as positive examples of government and industry

working together. They may become the cornerstone of a new "industrial policy" perspective in which government looks for ways to assist the competitive and marketing capabilities of industry.

Even though checkoff programs have recently been subjected to increased challenges, the popularity of checkoff programs will continue to increase and they will become a viable component in providing cooperatively-funded marketing services for many years to come.

## NOTES

1. 7 U.S.C. §§ 601, *et seq.*
2. 885 F.2d 1119 (3rd Cir. 1989).
3. *Id.* at 1137.
4. See, e.g., Cotton Research and Promotion Act (7 U.S.C. §§ 2701-2718); Egg Research and Consumer Information Act (7 U.S.C. §§ 2701-2718); Potato Research and Promotion Act (7 U.S.C. §§ 2611-2617); Floral Research and Consumer Information Act (7 U.S.C. §§ 4301-4319); Wheat and Wheat Foods Research and Nutrition Education Act (7 U.S.C. §§ 3401-3417).
5. 7 U.S.C. §§ 4501 *et seq.*
6. The exception to this was the Wool Act, which did not provide a refund provision either.
7. Beef Research and Information Act, 7 U.S.C. §2907; Pork Promotion, Research and Consumer Information Act of 1985, 7 U.S.C. §4813.
8. The legislation authorizing the lime, pecan and soybean programs authorized refunds at least through the period prior to the referendum. See 7 U.S.C. §6209 (limes). 7 U.S.C. §6007 (pe-cans), 7 U.S.C. § 6304 (soybeans).
9. See 7 U.S.C. §4809(c)(2)(A).
10. 7 U.S.C. §2904(5)(4)(A).
11. 7 U.S.C. §2904(5)(4)(B).
12. 7 U.S.C. §2902(9).
13. 7 U.S.C. §6304(p)(2)(c).
14. Frame, 885 F.2d at 1133-34.
15. Many promotion orders have provisions allowing (and in some instances requiring) a person to challenge the imposition of the order on that person through an administrative petition. In these situations, an administrative law judge will



conduct a hearing or write a report that includes a finding of facts and conclusions with respect to material issues, an order, and ruling or findings, conclusions, and orders submitted by the parties. The administrative law judge typically conducts a hearing and submits such a report to the administrator of the Agricultural Marketing Service, USDA.

16. 885 F.2d 1119 (3rd Cir. 1989).
17. Frame, 885 F.2d at 1126.
18. Frame, 885 F.2d at 1127.
19. Frame, 885 F.2d at 1128.
20. See In Re C.I. Ferrie, et al., NDPRB Docket No. 93-1, at 13 (November 10, 1994) (citing Cecelia Packing Corp. v. United States Dept. of Agriculture, 10 F.3d 616 (9th Cir. 1993)).
21. In a recent challenge to the Beef Promotion Act, a cattle producer argued that the assessment provisions of the act compelled him to engage in speech against his will, and in support expressed his concern that "promotion of beef and beef products is ideologically offensive to groups that espouse vegetarianism for religious or moral reasons and the health effects of eating substantial quantities of beef is still a matter of some controversy." Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, at 21, Goetz vs. United States, (Civ. Action No. 94-1299-FGT) (D.Kan. filed Aug. 2, 1993).
22. 14 F.3d 429 (9th cir. 1994).
23. Credit-back provisions allow a handler to fund "qualified" promotional activities and review a credit against the assessment due.
24. 10 F.3d 616 (9th Cir. 1993).
25. For a thorough discussion of the history and legal significance of congressional policy regarding cooperative associations, see Cecilia Packing, supra.
26. 7 U.S.C. §291.
27. 12 U.S.C. §§ 1141, et seq.
28. 12 U.S.C. §1141(a)(3).
29. 7 U.S.C. §§ 601, et seq.
30. Pescosolido v. Black, 765 F.2d 827, 828 (9th Cir. 1985).
31. 7 U.S.C. §608C(12).
32. Pursuant to the Dairy Promotion and Research Order, certified cooperative associations may vote on behalf of their members, as long as the individual members are provided with sufficient notice about the questions presented, a statement

about how the cooperative intends to vote on each question, and information regarding the procedure by which individuals may vote on their own behalf. 7 C.F.R. §1150.202.

## APPENDIX I

Beef Research and Information Act, 7 U.S.C. 2901-2911  
Cotton Research and Promotion Act, 7 U.S.C. 2101-2118  
Dairy Production Stabilization Act of 1983, 7 U.S.C. 4501-4513  
Egg Research and Consumer Information Act, 7 U.S.C. 2701-2718  
Floral Research and Consumer Information Act, 7 U.S.C. 4301-4319  
Fluid Milk Promotion Act of 1990, 7 U.S.C. 6401-6417  
Fresh Cut Flowers and Fresh Cut Greens Promotion and Information Act of 1993, 7 U.S.C. 6801-6814  
Honey Research, Promotion, and Consumer Information Act, 7 U.S.C. 4601-4612  
Lime Research, Promotion, and Consumer Information Act of 1990, 7 U.S.C. 6201-6212  
Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. 6101-6112  
National Wool Act of 1954, 7 U.S.C. 1781-1787 (Mohair)  
Pecan Promotion and Research Act of 1990, 7 U.S.C. 6001-6013  
Pork Promotion, Research, and Consumer Information Act of 1985, 7 U.S.C. 4801-4819  
Potato Research and Promotion Act, 7 U.S.C. 2611-2627  
Soybean Promotion, Research, and Consumer Information Act, 7 U.S.C. 6301-6311  
Watermelon Research and Promotion Act, 7 U.S.C. 4901-4916  
Wheat and Wheat Foods Research and Nutrition Education Act, 7 U.S.C. 3401-3417