CONSTITUTIONALITY OF CHECKOFF PROGRAMS

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I. INTRODUCTION

Checkoff programs contribute to the everyday lives of Americans. Unbeknownst to many, checkoff programs are a silent hand reaching beyond the boundaries of agricultural law. Since their inception in 1966 for the promotion of cotton, the United States Department of Agriculture (USDA) has approved the formation of twenty-two other programs.[1] Even though the effects of checkoff programs span across the nation, many do not understand what they are, the problems surrounding them, and what the future of these programs look like. This note will focus on how checkoff programs have changed, evolved, and disappeared in the last ten years by looking at the current legal issues and the future of the

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1. *Checkoff Programs*, FOOD & POWER, https://perma.cc/EZ8U-A4JG (archived June 15, 2020).

programs.

II. What are Checkoff Programs?

Generally, checkoff programs aim to support a particular agricultural commodity by providing research and promotion.[2] Their goal is "to improve the market position of the covered commodity by expanding markets, increasing demand, and developing new uses and markets."[3] There are limitations to what a program can do, however. For example, they cannot put all of their efforts into supporting a specific producer or brand of the commodity.[4] Checkoff programs cannot use their funds to lobby either.[5] These limitations are especially important because, in most cases, participation in the checkoff program is required for the producers and handlers.[6]

A. Participation and Funding Requirements

As mentioned, participation in the checkoff program is mostly required for any producer and/or handler. This means if someone is buying or selling the specific commodity the checkoff program was designed to promote and research, they must provide a certain amount of money to the checkoff fund.[7] Funding for checkoff programs is very industry specific.[8] The fund is usually built by a deduction from sales by producers to marketers and/or importers.[9] Importantly, federal legislation has placed a requirement on all checkoff programs to have the federal or respective state Secretary of Agriculture "appoint the board members and approve the boards' budgets, plans, projects, and contracts."[10] This federal legislation is vital to the existence of the checkoff programs because this is where the authority for the collection and use of funds derives. The various levels of organization, from state to federal, will be discussed later.

Checkoff programs can receive funding in a few different ways, which

2. *Checkoff Programs*, NAT'L AGRIC. LAW CTR., https://perma.cc/Z4FP-KFR2 (archived June 15, 2020).

3. *Id.*

4. *Id.*

5. *See id.*

6. *Id.*

7. USDA, USDA GUIDELINES FOR AMS OVERSIGHT OF COMMODITY RESEARCH AND PROMOTION PROGRAMS 5 (2015), https://perma.cc/KJ8M-2LY6 [hereinafter USDA GUIDELINES].

8. *Id.*

9. *Id.*

10. *Id.*

include taking portions of sales made by "producers, marketers, and/or importers."[11] Sometimes checkoff programs receive funds through donations or fundraisers.[12] This is especially prevalent when focusing on the research and promotion programs.[13] Because this funding is taken from a variety of sources and is charged to support a commodity as a whole, oversight is important not only to ensure trustworthiness, but to ensure the checkoff program is actually promoting the commodity as required.[14] This note will dive into the complexity of the organization of checkoff programs next, but it is important to understand oversight is carried out based on regulation requirements for the particular commodity program. For example, if a checkoff program is run solely through its state program, national oversight is not needed.[15] Likewise, if it is a national program that requires federal regulation, USDA's Agricultural Marketing Service (AMS) will be conducting the oversight and must follow specific guidelines.[16] How a checkoff program receives funds, as well as who must regulate this funding, may be a vital piece of the puzzle for the future of these programs. Failure to comply with controlling regulations may result in a fatal lawsuit.

An example of how funding can work for a program can be demonstrated through the National Soybean Act and Order. This legislation requires all soybean farmers to "pay into the soy checkoff at the first point of purchase."[17] The amount they must pay is set at "1/2 of 1% of the total selling price."[18] This set amount is required through the National Soybean Act and Order which was passed through the 1990 Farm Bill in order to require all soybean farmers to contribute at the first point of purchase to the national soy checkoff.[19] These funds can then be used for "promotion, research and education at both the state and national level."[20] Because the soy checkoff programs are run both at the state and national levels, the funds are distributed between state checkoff boards and the national board.[21] For example, half of the money is required to stay with the Iowa Board and the other

11. *Id.*
12. *Id.* at 7.
13. *See generally id.* at 5.
14. *See generally id.*
15. *Id.* at 6.
16. *Id.*
17. 7 U.S.C. § 6301 (2020); HOW THE SOY CHECKOFF WORKS IN IOWA, IOWA SOYBEAN ASS'N (2018), https://perma.cc/ZT9Y-57P3.
18. HOW THE SOY CHECKOFF WORKS IN IOWA, *supra* note 17.
19. *Id.*
20. *Id.*
21. *Id.*

half will be paid to the United Soybean Board.[22] Each checkoff program is run by a Board who is charged with directing how and where the funds are used.[23] Oversight of these funds and compliance with controlling regulation for the soy checkoff is performed by both the Iowa Secretary of Agriculture and AMS of the USDA.[24]

B. Organization

Checkoff programs can be run either federally or by the states themselves. As mentioned, Congress must authorize the implementation of the "industry-funded research and promotion (R&P) boards."[25] Because these boards aim to "provide a framework for agricultural industries to pool their resources" and to work together in an effort to expand or develop new markets, conduct research, or engage in promotional activities, it is important the organization runs smoothly so the funds are not misappropriated.[26] The USDA requires each commodity program to have a governing board.[27] Like the soybean checkoffs, some programs will have state boards and national boards involved.[28] Some programs will even have boards at a local level. These boards are charged with running the day-to-day activities of each commodity program.[29] For legal purposes, it is important to understand how the state and national programs are run. Importantly, regardless of how a checkoff program is organized, all programs must abide by the United States Constitution and the rights granted therein.

1. National Checkoff Programs

Some checkoff programs are established by federal authority and are run through national checkoff boards. National checkoff boards are governed by the USDA and overseen by AMS as delegated by the Secretary of Agriculture.[30] AMS ensures there is "fiscal accountability and program integrity."[31] AMS's role in

22. *Id.*
23. *Id.*
24. *Id.*
25. USDA, *Research & Promotion Programs*, AGRIC. MKTG. SERV., https://perma.cc/C8HH-JGWK (archived June 15, 2020) [hereinafter *Research & Promotion Programs*].
26. *Id.*
27. *Id.*
28. *See generally* HOW THE SOY CHECKOFF WORKS IN IOWA, *supra* note 17.
29. *Research & Promotion Programs*, *supra* note 25.
30. *Id.*
31. *Id.*

these programs is very active and they have specific guidelines they must follow.[32] This allows the AMS to ensure consistency between the checkoff programs when it comes to "fiscal responsibility, program efficiency, and fair treatment of participating stakeholders."[33]

2. State Checkoff Programs

Checkoff programs can also be established and governed under state statute. If this is the case, federal legislation will not be controlling and programs will follow their state specific rules and regulations.[34] However, state programs are still likely to be overseen by their own Department of Agriculture, Consumer, Affairs, or some other state agency.[35] Unlike federal programs, states have their own constitution that may limit what the boards are able to do with the funds collected.

3. Mixed Checkoff Programs

Some checkoff programs, like the soybean checkoff, have both state and national checkoff programs that work together. These will be governed by both state and federal legislation. Notably, funds from the national board can be used for state specific programs.[36] This is a controversial issue that the court has considered in the past.[37]

So how do mixed checkoff programs work? Some federal legislation will specifically require oversight of state and local programs. If this is the case, AMS will use their guidelines to ensure conformity.[38] However, if state statute does not require federal involvement "the [AMS] guidelines do not apply as a whole to State, regional, or local programs."[39]

Notwithstanding, some state, regional, and local programs are allowed to use national funds to support lower level programs.[40] Even if it is not a mixed checkoff program, if national funds are being distributed to specific state, regional, or local programs, AMS must be involved to guarantee the funds are expended in

32. *Id.*; USDA GUIDELINES, *supra* note 7, at 6.
33. *Research & Promotion Programs*, *supra* note 25.
34. USDA GUIDELINES, *supra* note 7, at 6.
35. *Id.*
36. *Id.*
37. *See generally* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).
38. USDA GUIDELINES, *supra* note 7, at 6.
39. *Id.*
40. *Id.*

accordance with federal rules, regulations, and policies.[41] It is important to note that state, regional, and local programs do not have the authority to use national program funds without the approval of the national board.[42] Therefore, a state checkoff program cannot use the entire fund collected for their own marketing campaign without the national board's approval.

To demonstrate how a state program can work individually and cohesively with the national program, analyzing the Soybean Checkoff is helpful. 7 U.S.C. §§ 6301-6311 establishes authority for a soybean checkoff to take place both at the federal level and state level. In relevant part, it creates "[s]tate and national organizations conducting soybean promotion, research, and consumer education programs that are valuable to the efforts of promoting the consumption of soybeans and soybean products."[43] The 1990 Farm Bill gave rise to the National Soy Checkoff.[44] The Bill encompassed the National Soybean Act & Order which requires soybean farmers to pay into the program "at the first point of purchase."[45] This is the point in the organization where both national and state interests come into play because the lines can become easily blurred on how and where money is spent. Farmers become uneasy when they learn their money that is required to be paid into the checkoff fund may not be going back to serve them and is instead going to a market across the nation.

The National Soybean Checkoff is created through 7 U.S.C § 6301(b) which states:

> Congress declares that it is in the public interest to authorize the establishment, through the exercise of the powers provided in this chapter, of an orderly procedure for developing, financing through assessments on domestically-produced soybeans, and implementing a program of promotion, research, consumer information, and industry information designed to strengthen the soybean industry's position in the marketplace, to maintain and expand existing domestic and foreign markets and uses for soybeans and soybean products, and to develop new markets and uses for soybeans and soybean products.[46]

Using Iowa as an example of applicable state legislation, the Iowa Code establishes the state's authority to have its own soybean checkoff. Section 185.11

41. *Id.*
42. *Id.*
43. 7 U.S.C. § 6301(a)(5) (2020).
44. HOW THE SOY CHECKOFF WORKS IN IOWA, *supra* note 17.
45. *Id.*
46. 7 U.S.C. § 6301(b) (2020).

of the Iowa Code establishes the purpose of the Soybean Board, stating the board is obligated to govern the state organization that runs the day-to-day operations of the program.[47] In Iowa, this is the Iowa Soybean Association. Section 185.1B states "[t]he Iowa Soybean Association shall aid in the promotion of the soybean industry through research, education, public relations, promotion, and market development projects and programs as directed by the board to accomplish its purposes. . . ."[48] Section 185.26 of the Iowa Code is controlling when Iowa soybean farmers get to the point where they are required to contribute to the checkoff program.

When a farmer is at the stage where they are required to contribute to the fund, "1/2 of 1% of the total selling price is collected per the National Soybean Act & Order."[49] Half of the money remains in Iowa and contributes to "research, freedom to operate, market development, and environmental programs."[50] The remaining dues are delivered to the United Soybean Board (USB) to be used for their Long-Range Strategic Plan.[51]

What is interesting about the Iowa Soybean Checkoff is the ability of farmers to request a "refund of assessment."[52] If a producer does not want to participate in the program by having part of their required deduction of the sale price go to the state, they may request a refund.[53] To do this, the farmer fills out a written application to the board who then "secure[s] a refund in the amount deducted."[54] The catch is the refund does not go back to the farmer.[55] Instead, this refund must be directed to the United Soybean Board to be put to use for the national program.[56] The federal legislation does not allow for refunds and trumps the state checkoff rule.[57] Instead, it turns the refund into a "redirect" back to the United Soybean Board.[58] This is an important distinction because, as mentioned before, farmers are required by both state and federal law to participate in these programs and to have the sale price of their commodity reduced.

47. IOWA CODE § 185.11 (2020).
48. IOWA CODE § 185.1B (2020).
49. HOW THE SOY CHECKOFF WORKS IN IOWA, *supra* note 17.
50. *Id.*
51. *Id.*
52. IOWA CODE § 185.27 (2020).
53. *Id.*
54. *Id.*
55. 84 Fed. Reg. 20765, 20766 (May 13, 2019).
56. *Id.*
57. *Id.*
58. *Id.*

The organization of a checkoff program is important regarding the most recent issues surrounding these organizations. Many of the arguments that are being raised involve the constitutionality of checkoff programs and are aimed at the structural accountability, or lack thereof, of these programs.

III. CURRENT ISSUES SURROUNDING CHECKOFF PROGRAMS

Checkoff programs survived a lot of heat during the early 2000s.[59] Groups like Ranchers Cattleman Action Legal Fund United Stockgrowers of America (R-CALF USA) were fighting against the constitutionality of the programs, arguing, among other things, that checkoff programs were going beyond their authorized purpose to selectively promote large business and were promoting the commodity in a way that was not in the interest of the farmers who were required to pay into the funds.[60] After making it through this period—where the stability of checkoff programs were in question—people had faith the programs would survive into the future. Unfortunately, in the last ten years, legal issues have begun to reappear and the question of the longevity of the programs are once again at issue.

Farmers, participants, and other interested parties are not done questioning the constitutionality of checkoff programs. In the last decade, new concerns and complaints regarding the use of checkoff funds have been raised.

A. Past Litigation Setting the Stage for Today's Issues

Over the years, several actions have been filed relating to the constitutionality of checkoff programs.[61] The challenges do not vary significantly when looking at the substance of them. A majority of these challenges have focused on the First Amendment.[62] Namely, the right of free speech and the right of association. These areas are disputed because, like mentioned above, contributors to the program are required under statute to pay into the fund. These contributors may feel like their funds are being used for speech they do not agree with or forcing them to associate with a group that they do not agree with.[63]

The United States Supreme Court has both agreed and disagreed with the challengers' positions. In one of the first cases brought to the Supreme Court, it was held that because the funds "were part of a broader regulatory framework

59. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005).

60. *Checkoff Programs – An Overview*, THE NAT'L AGRIC. LAW CTR., https://perma.cc/T3DE-4XG6 (archived June 15, 2020).

61. *Id.*

62. *Id.*

63. *Id.*

included in a marketing order. . .” they did not violate the First Amendment and therefore were legal.[64]

The Supreme Court has also upheld when funds are used as government speech, the use is legal and is not in violation of the First Amendment.[65] To be considered government speech, one must meet three requirements: (1) enough control must be asserted by the government that it can ultimately be deemed responsible for the message the funds are promoting; (2) the assessments being used must originate from a single source; and (3) the government’s central purpose and the checkoff’s central purpose must be identical.[66] A caveat to the Court’s holding was the possibility the checkoff program could still be found unconstitutional, even if it was government speech, if the funds were used for individual advertisements which were primarily aimed to promote producers the contributors disagreed with or did not affect them.[67] For example, a third decision the Court analyzed found the program violated constitutional guarantees because the funds “were directed primarily at generic advertising that some producers did not support.”[68]

Although the issues presented to the United States Supreme Court have been thoroughly discussed, they have not disappeared over the years. Previous cases focused mainly on the First Amendment’s free speech guarantee, which argued the programs are using their funds to promote and “speak” for causes the contributors do not agree with. Even though this is still applicable today, forced association quarrels arise as well.

The last ten years has revealed farmers and producers are not all content with the previous decisions. There are still efforts to control and monitor where checkoff funds are going. Moreover, questions are still looming over how applicable government speech is when analyzing state checkoff programs. Some states are even allowing private entities to run the checkoff programs, which has led to new and intriguing constitutional issues.[69]

64. *Id.*; *see also* Keller v. State Bar of Cal., 496 U.S. 1 (1990).

65. *Checkoff Programs – An Overview*, *supra* note 60; *see also* Johanns v. Livestock Mktg. Ass’n, 544 U.S. 550 (2005).

66. Roger McEowen, *Supreme Court Rules That Beef Check-Off Is Government Speech; But Check-Off Litigation May Not Be Over*, AGRIC. L. DIG. (July 2005), https://perma.cc/XE88-8FWV.

67. *Checkoff Programs – An Overview*, *supra* note 60.

68. *Id.*

69. *See generally id.*; *see also* Ranchers-Cattlemen Action Legal Fund v. Vilsack, No. CV-16-41-GF-BMM-JTJ, 2016 WL 9804600 (D. Mont. 2016).

B. Today's Issues

1. Montana Beef Checkoff

One of the checkoff programs under attack for having a private entity use checkoff funds to promote the commodity was the beef checkoff, specifically the Montana Beef Council using checkoff funds.[70] The fight began in 2016, when the Ranchers-Cattlemen Action Legal Fund (R-CALF) filed suit against Secretary Vilsack arguing national funds cannot be used to fund private speech.[71] The plaintiffs disagreed with how the Montana Beef Council was using national funds to advertise beef.[72] Namely, they were not happy with the "lack of distinction between foreign and domestic beef."[73]

The National Beef Checkoff, promulgated in the Beef Promotion and Research Act of 1985, required a collection of funds "of $1.00-per-head of cattle each time cattle are sold."[74] From here, the beef checkoff gives authority to state beef checkoffs to collect the assessments and then use fifty cents from every dollar towards promotion as they see fit.[75] The Montana Beef Council was given authority to use the state checkoff funds by demonstrating various requirements outlined in 7 C.F.R. § 1260.181(b).[76] However, the Montana Beef Council is a private entity and is not created or governed through state law.[77] Because of this nuance, cattle farmers are not required to contribute directly to the council, yet their money is being used at this private entity.[78] Importantly, the federal government is still involved with state beef councils that are given authority to use the checkoff funds.[79] For example, "[t]he government ensure[s] that the [Montana Beef Council] uses its portion of the assessments to fund promotion and research as well as to provide consumer and industry information via a one-time certification and an annual review of the [Montana Beef Council's] accounting records."[80] Notwithstanding, the Montana Beef Council is solely responsible for

70. *Checkoff Programs – An Overview*, *supra* note 60; *Vilsack*, 2016 WL at *1.
71. *Id.*
72. *Id.*
73. *Vilsack*, 2016 WL at *2.
74. *Id.* at *1.
75. *Id.*
76. *Id.*; 7 C.F.R. § 1260.181(b) (2020).
77. *Vilsack*, 2016 WL at *1.
78. *Id.*
79. *Id.* at *2.
80. *Id.*

how the funds are directed to promotional activities.[81] Due to this organization, R-CALF voiced their opposition by filing a lawsuit.[82] Basically, they argued this private entity is violating the First Amendment to fund private speech.[83]

Supporters of the structure argue "the motives behind the lawsuit have less to do with First Amendment infringements and more about incapacitating the National Cattlemen's Beef Association (NCBA)."[84] NCBA is a checkoff contractor, like the Montana Beef Council, who is chosen to implement projects by being allotted checkoff money.[85] Supporters believe the NCBA's "focus is on 'growing the industry and responding to consumers in the right way'" and they stand behind this mission.[86] The past NCBA President, Craig Uden, has expressed his disappointment for opposing parties to fight so hard to dismantle the checkoff program because he has been able to see "the value of the checkoff at many levels."[87] Supporters, like Nebraska cattleman Uden, argue checkoff opponents are "tak[ing] away some of the producer control because the state beef councils manage their 50% of the check off."[88] Further, it is argued the work done within the state checkoff program is appreciated within cattle producers for the effect it has had on international trade.[89]

Supports believe R-CALF does not actually oppose the beef checkoff programs but has personal reasons for fighting so hard to dismantle a program that can actually help the commodity. This is evidenced by R-CALF expanding their efforts beyond just Montana to place injunctions on fourteen other states and allegedly working with the Humane Society of the United States (HSUS) and the Organization for Competitive Markets (OCM).[90] The states that opponents have begun to attack include: "Hawaii, Indiana, Kansas, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Carolina, South Dakota, Texas, Vermont and Wisconsin."[91]

81. *Id.*
82. *Id.* at *1.
83. Greg Henderson, *Contentious Battle Continues over the Beef Checkoff*, AG WEB (Oct. 12, 2018, 9:13 AM), https://perma.cc/BN4A-HHSL.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*

R-CALF USA v. Purdue was decided in June of 2017, and the challengers, R-CALF USA, wanted the court to declare that the Federal Beef Checkoff Program implemented in Montana violated the First Amendment because it allowed the Montana Beef Council "to use a portion of [the] federal beef checkoff to fund promotional campaigns. . . ."[92] This case is distinguished by past litigation as it veers around the government speech issue to argue the federal program is forcing contributors to associate with the Montana Beef Council.[93] R-CALF USA is suing Sonny Perdue (and not Vilsack as in the motions heard in *Ranchers-Cattlemen Action Legal Fund v. Vilsack*) in this litigation because he became the new Secretary of Agriculture for the United States.[94] Perdue's job required overseeing all checkoff programs that stem from any Farm Bill Legislation, including the Federal Beef Checkoff Program. R-CALF USA claimed the federal program was unlawfully subsidizing the Montana Beef Council for private speech that the rest of the nation's contributors did not agree with.[95] Therefore, R-CALF USA argued this was forced association in violation of the First Amendment of the Constitution.[96] To fix this error, the R-CALF USA wanted the Secretary of Agriculture to stop allowing the Montana Beef Council to collect checkoff assessments from the federal program.[97] To overcome this request, they proposed that all contributors have the ability to pay their assessments directly to the federal Beef Board.[98] R-CALF USA argued this would solve the problem of the funds being used for speech they did not agree with.

On the other hand, Perdue argued the litigation should be dismissed according to the Federal Rules of Civil Procedure 12(b)(1) for lack of standing.[99] Specifically, he claimed the R-CALF USA did not meet the causation and redressability elements of standing.[100]

Regarding causation, Perdue pointed out the plaintiffs are not forced to pay money to the Montana Beef Council because they can opt out by "submitting a redirection request to the Montana Beef Council to forward the full amount of the

92. Ranchers-Cattlemen Action Legal Fund v. Perdue, No. CV 16-41-GF-BMM, 2017 WL 2671072, at *1 (D. Mont. 2017).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at *7.

98. *Id.*

99. *Id.*

100. *Id.*

checkoff payment to the Beef Board."[101] "Cattle producers in Montana must pay the checkoff assessments to the Montana Beef Council. One-half of the monies received by the Montana Beef Council fund the Montana Beef Council's advertising program unless the cattle producer opts-out by submitting a proper redirection request."[102] This opt out provision proved to be an obstacle. When reviewing Perdue's argument, the Court saw a problem with the opt-out provision. Using *Knox v. Service Employees Intternational Union, Local 1000* as precedent, the Court found this type of redirection option violates the First Amendment.[103] "An op-out provision fails to alleviate the First Amendment violation that arises, however, when the Government compels a citizen to subsidize the private speech of a private entity."[104] To get around this violation, "[t]he Government first must secure the citizen's 'affirmative consent' through an opt-in provision when it wishes to have a citizen fund private speech through a compelled subsidy."[105] Therefore, the Court held R-CALF USA satisfied the causation requirement for standing.[106] The Court then determined the advertisements of a state beef council may violate the First Amendment's prohibition of government compelled private speech and granted an injunction.[107] This government compelled private speech would force the producers to support certain expressions they may not agree with.[108] The Circuit Court of Appeals later upheld the injunction and enjoined the USDA from allowing money from the Montana checkoff to be given to the Montana Beef Council for promotions unless Montana ranchers consented to it.[109] Specifically, the Montana Beef Council is now required to obtain consent from all contributors in order to retain money from the beef checkoff for its own advertising campaigns.[110] If the state does not receive consent, the money goes to the National Cattlemen's Beef Board.[111]

The result of this litigation sent some checkoff programs back to the drawing

101. *Id.* at *9.

102. *Id.*

103. *Id.* at *10 (citing Knox v. Serv. Employees Int'l Union, Local 1000, 132 S. Ct. 2277, 2295-96 (2012)).

104. *Id.* (citing Knox, 132 S. Ct. at 2293).

105. *Id.* (citing Knox, 132 S. Ct. at 2295-96).

106. *Id.* at *11.

107. *Checkoff Programs – An Overview*, *supra* note 60.

108. *See generally* David L. Hudson Jr., *Compelled Speech*, THE FIRST AMEND. ENCYCLOPEDIA, https://perma.cc/5BZJ-Q2MQ (archived June 15, 2020).

109. Henderson, *supra* note 83.

110. *Checkoff Programs – An Overview*, *supra* note 60.

111. *Id.*

board. It was clear checkoff programs structured similarly to the beef checkoff were at risk of constitutional violations. As such, it was time to question the legality of these programs to not only conform to the Constitution, but also ensure farmers were not underfunded and underrepresented by the disappearance of checkoff programs. This led to the USDA enacting amendments regarding how these programs are run.[112]

2. Restructuring

Amendments were made by the federal Soybean Promotion, Research, and Consumer Information Order and the federal Beef Promotion and Research Order in May of 2019.[113] The intent behind these amendments was to make it known to producers they are not required to allocate any money to the state programs.[114] These amendments were aimed to clearly show producers have the ability to "redirect" the required collection.[115] This means "a producer can choose to redirect their checkoff assessments to the national program when allowed by state law."[116] When this option is chosen, the state boards or councils for the respective checkoff must forward the assessments which would have stayed within the state to the national programs.[117] The key phrase in the amendment is "allowed by state law."

In checkoff programs where both state and national boards provide oversight, it is important to follow both state and federal regulations. This 2019 amendment in the beef and soybean checkoffs allowed for a "redirect" when "allowed by state law."[118] Some state law will require "the assessments to be directed to a state board or council" and remain there to be used for the respective checkoff. In this case, no redirect is possible.[119] Other state laws will require an assessment at the state level but allow for a refund to be given to the producer.[120] In these instances, the producer is not forced to contribute to the research and promotion of the checkoff programs because they can get their money back.

112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*

3. Refund

Checkoff programs require an assessment to be collected and directed to the state level but allow a refund for many reasons. One reason is to avoid constitutional challenges by not forcing any participation within the program.

The Colorado Corn Checkoff is an example where state law allows a refund.[121] It is important to note, corn checkoff programs are organized differently than the beef checkoffs. Unlike the beef checkoffs, corn checkoffs are state run and do not have oversight by national programs. This is an important difference because the assessment does not have to go any further than the state programs. This is why there is not a "redirect"—but instead a "refund"—since there is no federal regulation requiring funds to be collected. In Colorado, all corn growers must pay into the checkoff pursuant to the 1987 Corn Marketing Order under the Colorado Agricultural Marketing Act of 1939 Title 5, Article 28 of the Colorado Revised Statutes.[122] Each producer is required to contribute one cent per bushel (56 pounds).[123] This assessment is collected "by the 'first handler' (typically an elevator or livestock feeder/producer) directly from the grower and remitted to the Colorado Corn Administrative Committee (CCAC)."[124] When the funds are received, they are managed within the state by the CCAC.[125] This includes their overseeing board, consisting of volunteer farmers who invest the funds to enhance marketing opportunities, increase commodity competitiveness across the globe, and increase profits and sustainability.[126] To receive a refund a producer must "request an Application for Refund of Corn Assessment form."[127] Producers have thirty days from the date of assessment to complete these forms.[128]

Refunds may not be as glamorous as they seem at the outset. If checkoff programs are only run state-by-state, they miss a valuable asset by not having a national program fighting on the respective commodities behalf. Having fifty individual checkoffs may raise the possibility the commodity lacks uniformity and the power to keep promotion and research surging forward. Furthermore, without the national program's support, each checkoff has reduced funding and less ability

121. COLO. REV. STAT. § 35-28-103 (2019); *Your Checkoff $$: What is a Check-off Program Exactly?*, COLO. CORN, https://perma.cc/M6AW-JRWD (archived June 15, 2020).

122. *Your Checkoff $$ - What is a Check-off Program Exactly?*, *supra* note 121.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

to invest money back into the commodity. Not to mention, if producers have an opportunity to check the box for a refund, state checkoffs may have reduced funding leading to less successful programs. Having the ability to give a refund comes at a cost. Here, a literal cost where funding may be lacking. This may be why the Colorado Corn website has the following quote by Theodore Roosevelt located within their website, encouraging participation within the checkoff program: "Every man owes a part of his time and money to the business or industry in which he is engaged. No man has a moral right to withhold his support from an organization striving to improve conditions within his sphere."[129] If producers continuously choose to receive a refund, the checkoff program will lack funds to support the very industry those farmers are competing in.

4. An Effort to End Checkoff Programs

The effort to end checkoff programs is not new within the last decade. In 2001, the mandatory pork checkoff was voted to come to an end.[130] Members from the Campaign for Family Farms (CFF) worked together against the National Pork Producers Council (NPPC) to end the required tax.[131] In 2000, over 30,000 pork farmers voted to end their commodity program with an overwhelmingly 53% of farmers against continuance of the program.[132] This fight took over three years and the hog producers who voted yes (53% of voters), said they did so "because it has been used to promote the interests of factory farms and corporate meatpackers and hasn't helped independent producers increase their bottom line."[133] Hog producers voiced their opinion, saying this fight was not just to end a program that was no longer working.[134] Instead, it was to cut off the life source for corporate farms who are putting family farms and individual producers out of business.[135] These hog producers believed the checkoff was building up funds, based off the hard work of individual farmers, solely to help the corporate farm.[136] An Illinois hog farmer, and a member of the Illinois Stewardship Alliance and CFF spokesperson, Phil Wright, states: "Throughout this campaign it was hog farmers who did the heavy lifting [to] make sure the referendum was held and it was hog farmers who voted to end

129. *Id.*

130. *Hog Farmers End Mandatory Pork Checkoff: Independent producers vote down pork tax*, RURAL AM., https://perma.cc/9WW8-7HSP (archived June 15, 2020) [hereinafter *Hog Farmers*].

131. *Id.*

132. *Checkoff Programs*, *supra* note 1.

133. *Hog Farmers*, *supra* note 130.

134. *Id.*

135. *Id.*

136. *Id.*

the National Pork Producer Council's million dollar a week gravy train."[137]

Naturally, the NPPC disagrees. The National Pork Checkoff produces dozens of fact sheets and brochures to demonstrate results the checkoff funded initiatives are doing to help producers.[138] After the vote took place to end the pork checkoff, the U.S. Department of Agriculture reached a settlement with hog farmers allowing the program to stay.[139] The settlement called for the NPPC to no longer receive money from the checkoff in order to prevent speech from being promoted that some hog producers did not agree with.[140] The checkoff continues to collect "$0.40 per $100 of value when pigs are sold and when pigs or pork products are brought into the United States."[141] Because the pork checkoff is a national program, no refund is available.[142] But, the checkoff is conscious about utilizing the funds to help all pork farmers by executing specific programs to enhance, promote research, and educate, without spending the money on lobbying efforts or to influence government policy.[143]

The vote against the pork checkoff sets the stage for many who oppose checkoff programs. It demonstrates the delicate interplay between checkoff money being spent to promote and further a commodity and checkoff money being spent to promote specific producers and policies producers may not agree with. This interplay can sometimes be blurred, which leads to the unsteady future of checkoff programs.

IV. THE FUTURE OF COMMODITY PROGRAMS

Ten years ago people were hopeful in the future of these commodity programs, even declaring, "[t]he future of federal checkoff programs looks sunny, as the strong constitutional storms of recent years appear to have passed."[144] Yet, even in 2010, academics could foresee changes would be needed for the survival

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137. *Id.*

138. *About*, PORK CHECKOFF, https://perma.cc/8H2U-P25W (archived June 15, 2020).

139. Matthew Wilde, *Pork checkoff ruling leaves many squealing: Agriculture Department says program to continue despite vote to ditch it*, THE COURIER, (Mar. 5, 2001), https://perma.cc/PEE3-EBLA.

140. *Id.*

141. *About*, *supra* note 138.

142. *Id.*

143. *Id.*

144. MICHAEL SABET, UNDERSTANDING THE FEDERAL COMMODITY CHECKOFF PROGRAM 30 (2010), https://perma.cc/E5AT-DRA8.

of checkoff programs.[145] Commodity programs affect consumers and a shocking amount of people do not even understand, or know about, these programs. This lack of understanding can produce disgruntled remarks by individuals, farmers, and groups, who would like to see these programs disseminate. On the other hand, some people are very knowledgeable in the checkoff field, but see these programs as controversial "tax programs" that "disproportionately serve the interests of large-scale, corporate producers."[146] Others fight for the extinction of these programs merely because they do not agree with the types of research and promotion the funds are being used for. Furthermore, agriculture is in an age where consumers are highly involved and seeking information about how the food industry works.

How are these positions at odds with the future of checkoff programs? People are opposing universal funding for commodity programs, despite farms and businesses aiming to collaborate cohesively to engage in industry-wide strategies to promote and expand markets—leading to a more successful food industry.[147] This opposition has led to re-configuration of programs, deletion of programs, and a shaky future. Moreover, people are being more vocal about their opinions of the agricultural industry with potentially false or misleading information. What, then, is the future for these programs?

If Courts begin to find the structure and activity of checkoff programs to be unconstitutional, a new opportunity for commodity programs to receive funding will be vital. Checkoff programs were initiated from the beginning to ensure American farmers had the support and means to enter markets they deserved because farmers are such an important piece to America's economy.

So how do we ensure the future of commodity programs are not at risk? The answer is not clear, and it may not be a single approach, but there are opportunities and possibilities for the future of checkoff programs to survive. This may be through re-structuring the programs to ensure compliance with all constitutional requirements. Perhaps the funding requirements should be altered so not every purchaser, producer, market, etc., must be involved in each respective program. The answer may lie in turning purely to donations to fund individual research and promotion ideas—not limiting it to one program per commodity. Should it be a voluntary program where farmers are only supported when they choose to be part of it? Maybe a vote for every single way the money will be used should be required.

145. *Id.*

146. *Checkoff Programs*, *supra* note 1.

147. *Checkoff Programs*, *supra* note 1; David R. Shipman, *Industry Insight: Checkoff Programs Empower Business*, USDA (Feb. 21, 2017), https://perma.cc/2NW6-MSN2.

Whatever way the wind blows on these commodity programs, it is obvious they cannot be forced to the wayside. Like Theodore Roosevelt said, every person engaged in an industry must do their part to ensure its success.[148]

Checkoff programs have existed in the shadows for most Americans. These programs have silently supported their respective commodity to enhance the economy, reduce costs for consumers, and promote the commodity from states to around the globe. Now the opposition may be speaking louder than the supporters, and checkoff programs may be at risk for the future as opposition continues to spend a large budget to intervene with the program's goals. One thing is certain, all who are involved in shaping the future of checkoff programs should think hard about how American commodities will get the support they need to thrive. Alternative ways to champion our commodities will be vital for our economy—so be a leader, support America's commodities, and help shape the way for their victories in the future, whether through checkoff funds or not.

148. *Your Checkoff $$ - What is a Check-off Program Exactly?*, *supra* note 121.