

UNDERSTANDING THE FEDERAL COMMODITY CHECKOFF PROGRAM

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I. INTRODUCTION

Checkoff programs are known by the public for their catchy advertisements such as the “Beef, It’s What’s For Dinner®” television commercials and the “Got Milk?®” slogan. But these programs may be better recognized by lawyers for their detailed regulatory schemes and contribution to free speech doctrine. The purpose of a commodity checkoff program is to promote generic commodities produced by the U.S. agricultural industry. These government-sponsored programs impose mandatory assessments on commodity producers and processors, which are in turn used to fund programs that are meant to increase demand for and sales of the covered commodity. The below discussion will provide a detailed overview of federal commodity checkoff programs and the financial and legal implications of these programs.

After this introduction, Part II will discuss the statutory authority for checkoff programs and will highlight the purpose and function of checkoffs, as well as the statutory rules associated with these programs. Part III will discuss the various purported benefits of checkoff programs. Part IV will discuss the opposition to checkoff programs, particularly critics’ arguments regarding the inequitable and unconstitutional nature of commodity checkoff programs. This section will devote considerable attention to a line of Supreme Court cases involving the constitutionality of checkoff programs under the First Amendment. Part IV will also include a synthesis of this case law that is meant to provide a framework for designing a checkoff that is less susceptible to constitutional attack. Part V will conclude by summarizing the discussion and making suggestions for improving commodity checkoff programs.

II. STATUTORY AUTHORITY

Congress has stated that “[i]t is in the national public interest and vital to the welfare of the agricultural economy of the United States” to utilize checkoff programs to stabilize and strengthen the marketplace for certain agricultural commodities.¹ Accordingly, Congress has passed various laws that authorize and implement commodity checkoff programs. The overarching body of law that recognizes and coordinates all such “commodity promotion laws” is found in the Commodity Promotion, Research, and Information Act of 1996 (“Commodity Promotion Act” or “the Act”).² This statute authorizes the use of “industry-funded, Government-supervised” commodity checkoff programs and lays out the basic structure of such programs.³ Additionally, each individual commodity checkoff program has its own stand-alone federal statutory authority,⁴ although there are also some checkoff programs that are authorized exclusively by state law.⁵ Although checkoff programs for different commodities can

¹ 7 U.S.C. § 7401(b)(1) (2006).

² *Id.* §§ 7411-7425. The Commodity Promotion, Research, and Information Act of 1996 essentially covers and controls all related federal commodity promotion laws and commodity-specific federal statutes, and augments The Agricultural Marketing Agreement Act of 1937 which was the original source of federal authority for such programs. *See generally id.* § 7401(a).

³ *Id.* § 7401(b)(1).

⁴ Jennifer W. Zwagerman, *Checking Out the Checkoff: An Overview and Where We Are Now That the Legal Battles Have Quietened*, 14 DRAKE J. AGRIC. L. 149, 151 (2009). For example, the Beef checkoff program’s stand-alone statutory authority is the Beef Research and Information Act of 1985. 7 U.S.C. §§ 2901-2911 (2006).

⁵ For example, state checkoff programs are in effect for commodity products such as Washington state apples and Louisiana alligator. Zwagerman, *supra* note 4, at 151.

vary to some extent, the common congressional goal for all federal checkoff programs is to “maintain and expand markets for the agricultural commodity.”⁶

The goal of checkoff programs is to strengthen the marketplace for a commodity by maintaining or increasing the overall *demand* for the commodity.⁷ Congress sought to effectuate the goal of increased demand through “generic commodity promotion, research, and information programs.”⁸ Research and information programs include efforts designed to increase production efficiency as well as programs designed to increase the quality, demand, or image of the commodity.⁹ Promotional programs include activities that are meant to “present a favorable image” of the commodity or otherwise “stimulate sales.”¹⁰ As discussed later, the use of generic paid advertising is the most common promotional tool utilized by checkoff programs.¹¹

The Commodity Promotion Act authorizes the Secretary of Agriculture to oversee federal checkoff programs¹² and to appoint a commodity board to carry out each checkoff

⁶ 7 U.S.C. § 7401(b)(3); *see Zwagerman, supra* note 4, at 151.

⁷ *Id.* § 7401(b)(7); *see Gary W. Williams & Oral Capps, Jr., Overview: Commodity Checkoff Programs, CHOICES, 2nd Quarter 2006, at 53, available at* <http://www.choicesmagazine.org/2006-2/checkoff/2006-2-checkoff.pdf>.

⁸ 7 U.S.C. § 7414(b).

⁹ *See id.* §§ 7412(7), (13).

¹⁰ *See* 77 U.S.C. § 412(12) (2006).

¹¹ *See infra* Part II.B.

¹² 7 U.S.C. §§ 7411(b), 7412(a); *see id.* § 7401(b)(2). In reality, the Secretary of Agriculture coordinates with the USDA’s Agricultural Marketing Service (AMS) to carry out many of the administrative and oversight responsibilities associated with checkoff programs. *See* Geoffrey S. Becker, *Federal Farm Promotion (“Checkoff”) Programs*, CONGRESSIONAL RESEARCH SERVICE REPORT, Oct. 20, 2008, at 1, <http://www.nationalaglawcenter.org/assets/crs/95-353.pdf>. For a list of all AMS programs, *see* <http://www.ams.usda.gov>.

program.¹³ The commodity board's duties include the administration and implementation of the individual commodity's checkoff program,¹⁴ although some of the most visible functions of a commodity board include the collection of program funding¹⁵ and authorization of program expenditures.¹⁶

A. Checkoff Funding

Funding for federal commodity checkoff programs comes from mandatory¹⁷ contributions collected primarily from commodity suppliers.¹⁸ The rate of the assessment is recommended by the commodity board and approved by the Secretary of Agriculture.¹⁹ Assessments are typically based on a unit basis and are usually calculated to be about one-percent of the value of the commodity unit.²⁰ Although these statutorily-authorized assessments are mandatory and extend nationally in scope,²¹ the Commodity

¹³ 7 U.S.C. § 7414(b).

¹⁴ *Id.* § 7414(c).

¹⁵ *Id.* § 7416(b).

¹⁶ *Id.* § 7414(c).

¹⁷ As mentioned, this Paper focuses on mandatory commodity checkoff programs authorized by federal law. It is worth noting, however, that some commodity checkoff programs operate as either voluntary programs or as mandatory programs with potential assessment credits for certain activities. While voluntary checkoffs account for only a small percentage of funding for checkoffs, mandatory checkoffs with opportunities for advertising credits are not uncommon. *See* Becker, *supra* note 12, at 2; *see also infra* text accompanying notes 23 and 24.

¹⁸ *See* 7 U.S.C. § 7416(a). Suppliers who are obliged to pay an assessment are referred to as "first handlers." *Id.*

¹⁹ *Id.* § 7414(d).

²⁰ Ronald W. Ward, *Commodity Checkoff Programs and Generic Advertising*, CHOICES, 2nd Quarter 2006, at 56, available at <http://www.choicesmagazine.org/2006-2/checkoff/2006-2-checkoff.pdf>

²¹ 7 U.S.C. § 7413(a)(2).

Promotion Act provides some leeway under certain circumstances. For example, the Act authorizes the Secretary of Agriculture to exempt a commodity producer who produces a *de minimis* quantity of the commodity.²² Additionally, the Act authorizes checkoff participants to receive a credit for contributions to a similar state, regional, or local program,²³ as well as for individual marketing efforts known as “branded activities.”²⁴

The Commodity Promotion Act also allows program participants to vote by referendum for the continuation, suspension, or termination of the checkoff program.²⁵ The Secretary of Agriculture is required to hold such a referendum at least every three years,²⁶ and must additionally authorize and fund an independent evaluation of all federal checkoff programs every five years.²⁷ But so long as an established checkoff program remains in effect, a commodity supplier faces stiff penalties for failing to pay an assessment or for otherwise violating the program requirements. For example, a party who fails to pay a checkoff assessment will not only be assessed late fees and interest

²² *Id.* § 7415(a)(1).

²³ *Id.* § 7415(e)(1). For example, the beef checkoff program contains an assessment of one dollar per head of cattle, but beef producers can receive a credit of up to 50 cents per head of cattle for participating in and contributing to “an established qualified State beef council.” 7 U.S.C. § 2904(8)(C) (2006); 7 C.F.R. § 1260.172(a)(3) (2004).

²⁴ 7 U.S.C. § 7415(e)(2)(A).

²⁵ 7 U.S.C. § 7417(b)(1).

²⁶ *Id.* § 7417(b)(2). If the Secretary of Agriculture determines by referendum that a checkoff program is not favored by program participants, then the Secretary must terminate the collection of assessments within six months and must terminate all other activities under the checkoff program “as soon as practicable.” *Id.* § 7422(a)-(b).

²⁷ *Id.* § 7401(c). This independent evaluation is meant to assess “the effectiveness of the generic commodity promotion programs and other programs conducted by the board pursuant to a commodity promotion law.” *Id.*

charges,²⁸ but could also face a subsequent penalty of up to \$10,000 if the party is found to have willfully violated an order of the Secretary of Agriculture.²⁹ The Secretary is authorized to seek enforcement against a program participant in federal District Court.³⁰ An individual who does not believe he or she is subject to the checkoff may file a petition with the Secretary,³¹ and may appeal any decision to a federal Court of Appeals.³²

B. Checkoff Expenditures

The other highly visible function of commodity boards is their expenditure of funds collected through the checkoff program. Commodity boards have a good deal of flexibility in how they choose to spend checkoff assessments, although there are some restrictions. For example, a commodity board cannot use checkoff funds for lobbying efforts or otherwise “for the purpose of influencing any legislation or governmental policy.”³³ Commodity boards also may not use checkoff funds in a manner that would create a conflict of interest,³⁴ and may not use the funds to disparage another agricultural

²⁸ *Id.* § 7416(e).

²⁹ *Id.* § 7419(c)(1). Additionally, the Secretary may issue a cease-and-desist order against any covered party who is in violation of the Act, and may do so in addition to or in lieu of civil penalties. *Id.* § 7419(c)(3). The Secretary may not assess a civil penalty or issue a cease-and-desist order against a party until the Secretary provides notice and an opportunity for a hearing regarding the alleged violation. *Id.* § 7419(c)(4). But once a valid hearing has been held, then a party’s failure to obey a cease-and-desist order can subject the party to a separate civil penalty of up to \$10,000, with each day during which the failure continues being considered a separate violation. *Id.* § 7419(e).

³⁰ *See id.* § 7419(a).

³¹ *Id.* § 7418(a)(1).

³² *Id.* § 7419(d)(1).

³³ *Id.* § 7414(d)(2). Although lobbying efforts are statutorily prohibited, some critics argue that there can be a fine line between checkoff advertising and lobbying efforts. *See* Becker, *supra* note 12, at 5.

³⁴ 7 U.S.C. § 7414(d)(1).

commodity.³⁵ Finally, nearly all of the commodity board's decisions are either subject to preliminary approval by the Secretary of Agriculture or are subject to an after-the-fact veto by the Secretary.³⁶

As discussed, commodity boards are charged with developing and implementing the promotion, research, and information programs associated with a commodity checkoff program.³⁷ Promotional programs are the most common expenditure by commodity boards,³⁸ and by far, the use of generic paid advertising is the most widely recognized form of promotional activity associated with checkoff programs.³⁹

Generic commodity advertising can be found in magazines, on billboards, and frequently in radio and television commercials.⁴⁰ Some checkoff advertising slogans such as "Got Milk®?" are now widely recognized,⁴¹ while others are still attempting to establish themselves in popular culture.⁴² These advertising efforts contribute significantly to the effectiveness of promotional checkoff programs, which are believed

³⁵ *Id.* § 7414(d)(3).

³⁶ *See generally id.* §§ 7313, 7314.

³⁷ *Id.* § 7414(b).

³⁸ *See Williams & Capps, supra* note 7, at 53.

³⁹ Chanjin Chung, et al., *Producer Support for Checkoff Programs: The Case of Beef*, CHOICES, 2nd Quarter 2006, at 79, available at <http://www.choicesmagazine.org/2006-2/checkoff/2006-2-checkoff.pdf> (stating that the majority of the \$750 million collected annually through mandatory checkoff programs has been invested in generic advertising and promotional programs).

⁴⁰ Becker, *supra* note 12, at 2; Emily B. Buckles, *Food Fights in the Courts: The Odd Combination of Agriculture and First Amendment Rights*, 43 Hous. L. Rev. 415, 416 (2006).

⁴¹ *See id.*; *see also Zwagerman, supra* note 4, at 172.

⁴² For example, slogans such as "American Lamb From American Land®" and "Flowers, Alive With Possibilities®" may not have yet achieved the same popular recognition as other commodity advertising slogans such as "Beef, It's What's For Dinner®" or "Got Milk?®."

to provide an overall economic return of four to six dollars for every dollar spent.⁴³ As discussed in the following section, the purported benefits of commodity advertising and other promotional efforts have been recognized by both Congress and numerous agricultural law scholars.

III. BENEFITS OF CHECKOFFS

Commodity checkoff programs are widely believed to offer program participants various benefits, notwithstanding the criticism associated with such programs. Congress has recognized that many individual commodity producers “lack the resources or market power to advertise on their own,⁴⁴ and that checkoff programs can “operate as ‘self-help’ mechanisms for producers and processors to fund generic promotions.”⁴⁵ In essence, these programs allow program participants to enjoy the benefits associated with pooling their money together to create economies of scale in their promotional efforts.⁴⁶ The goal of such promotional efforts is to maintain and expand overall demand for the commodity,

⁴³ Ward, *supra* note 20, at 59 (noting the benefit-to-cost ratios of various commodity checkoff programs including beef (5.6:1), pork (4.8:1), dairy (4.6:1), flowers (6.6:1), prunes (2.7:1), (eggs (4.7:1), and processed oranges (ranging between 2:1 to 4:1 depending on the particular processed orange product)). Researchers disagree as to which particular program approach provides the most efficient and effective use of checkoff funds. Compare Michael K. Wohlgenant, *Distribution of Gains from Research and Promotion in Multi-Stage Production Systems: The Case of the U.S. Beef and Pork Industries*, AM. J. AGRIC. ECON. 75, Aug. 1993, with Chanjin Chung & Harry M. Kaiser, *Distribution of Gains from Commodity Checkoff Programs: Research vs. Promotion*, SMART MARKETING NEWSL., Aug. 2001, available at http://hortmgt.aem.cornell.edu/pdf/smart_marketing/chung8-01.pdf.

⁴⁴ 7 U.S.C. §§ 7401(b)(10), 7411(a)(4) (2006).

⁴⁵ *Id.* § 7401(b)(8).

⁴⁶ *See id.* § 7401(b)(10).

while not altering the market share of any individual program participant.⁴⁷ Thus, the hope of such programs is that everyone benefits equally and proportionately.

The goal of having all program participants benefit equally is one of the primary reasons that most modern checkoff programs are mandatory. The chief criticism of voluntary checkoff programs is the prevalence of free-riders; that is, individuals who benefit from the checkoff program, but do not contribute to the program.⁴⁸ Conversely, when a checkoff program is mandatory, everyone is required to contribute at the same rate based on their market involvement, and presumably everyone benefits accordingly. So whether a particular checkoff program focuses its efforts on generic advertising or research and development, all commodity suppliers contribute their fair share. Thus, one of the benefits of mandatory checkoff programs is the presumed elimination of the free-rider problem.

Another benefit of checkoff programs is the ability of program participants to create a consistent and coordinated advertising message. Branding of agricultural commodities is considered to be a difficult task because many producers are unable to effectively distinguish their particular version of a commodity product from other producers' products.⁴⁹ Accordingly, when one commodity producer attempts to promote its product over another commodity producer, there is a significant risk of economic inefficiency. More specifically, the net effect of ineffective branding efforts may at best consist of market share cannibalization among different commodity brands, and at worst

⁴⁷ See *id.* § 7401(b)(3); Ward, *supra* note 20, at 55.

⁴⁸ See Ward, *supra* note 20, at 56.

⁴⁹ *Id.* at 55; see Becker, *supra* note 12, at 2.

could create confusion among consumers who might begin to consider alternatives to the commodity being promoted.⁵⁰ Conversely, checkoff programs offer a highly efficient use of advertising dollars by delivering a clear, consistent message that is coordinated and widely disseminated to the public through targeted advertising.⁵¹ This maximized use of advertising resources offers the promise of increasing overall demand, rather than simply shuffling static demand from one producer to another.⁵²

Closely related to the benefit of efficiency associated with checkoff programs is the ability of program participants to closely evaluate the effectiveness of their checkoff expenditures. By having an independent board whose focus is to develop and evaluate the checkoff program, individual commodity suppliers can focus on what they do best: producing and processing commodity products, rather than attempting to evaluate promotional efforts.⁵³ Thus, commodity suppliers can rely on their checkoff board to work closely with advertising agencies and research and development organizations to efficiently utilize checkoff assessments, while also trusting that the checkoff board has the resources and ability to measure the effectiveness of such efforts.⁵⁴ Although mandatory commodity checkoff programs offer a number of substantial benefits, these programs have also been criticized and subject to numerous legal attacks.

⁵⁰ Cf. Ward, *supra* note 20, at 57 (recognizing that there can be a number of diverse groups within a particular commodity industry which creates competing interests and accompanying challenges in the design and delivery of the generic advertising message).

⁵¹ Cf. 7 U.S.C. § 7411(a)(6)-(7).

⁵² Cf. *id.* § 7411(a)(5).

⁵³ See *id.* § 7414(h); see generally *id.* § 7414(c); cf. Chung & Kaiser, *supra* note 43.

⁵⁴ See Ward, *supra* note 20, at 57.

IV. OPPOSITION TO CHECKOFFS

Opposition to commodity checkoff programs has centered around two types of arguments with several accompanying sub-arguments. First, critics argue that checkoff programs are inequitable and that program participants do not necessarily benefit from the programs. Second, critics argue that checkoff programs violate the First Amendment of the Constitution and are therefore unconstitutional. Although the constitutionality of checkoff programs has been the subject of significant litigation in recent years, the perceived inequity of checkoff programs was likely a motivating factor for the litigation. Regardless, both the equity arguments and constitutional arguments illustrate how much resistance is associated with commodity checkoff programs.

A. Equity Arguments

Critics of checkoff programs have raised a number of arguments regarding the inequities associated with checkoffs. As discussed below, these arguments involve the perceived unfairness and ineffectiveness of checkoffs, as well as other related issues. But at the heart of this dissent is the belief that mandatory checkoff programs are a violation of economic freedom.⁵⁵ When this perceived economic infringement is coupled with the impact of checkoff assessments on already-thin profit margins, it is easy to see why commodity producers are so displeased. This distaste for mandatory checkoff programs seems to color all of the non-constitutional arguments against the programs, although each of these arguments has its own legitimate bases.

⁵⁵ Michael K. Wohlgenant, *Retail-to-Farm Transmission of Generic Advertising Effects*, CHOICES, 2nd Quarter 2006, at 67, available at <http://www.choicesmagazine.org/2006-2/checkoff/2006-2-checkoff.pdf>.

1. Perceived Unfairness of Checkoffs

Many checkoff program participants believe that checkoffs are inherently unfair. One of the main reasons for this perception is that commodity suppliers may not believe that their gains are proportional to the gains of other program contributors.⁵⁶ This concern can be particularly acute when program participants produce branded products. For example, if Tyson believes that Perdue is disproportionately benefitting from the checkoff program, or is benefitting at the expense of Tyson's market share, then there can be a strong perception of inequity.⁵⁷ Brand-name commodity suppliers may also believe that they would be better off spending their advertising dollars on their own brand-specific advertising.⁵⁸ Checkoff legislation addresses this concern to some extent by permitting the use of credits towards checkoff assessments for brand-specific advertising.⁵⁹

Unfortunately, credits only offer a limited solution because the maximum permitted credit is often significantly less than the actual assessment.⁶⁰ Thus, commodity suppliers are often stuck paying for both the checkoff assessment and their own brand-specific advertising. Obviously, brand-name commodity suppliers would prefer a 100%

⁵⁶ See Ward, *supra* note 20, at 58; see also Farm Foundation, *Who Benefits, Who Loses From Commodity Checkoff Programs?*, available at <http://www.farmfoundation.org/webcontent/Who-Benefits-Who-Loses-from-Commodity-Check-off-Programs-211.aspx?a=211&z=86&>.

⁵⁷ *Cf. id.* at 59.

⁵⁸ *Id.*

⁵⁹ See *supra* note 24 and accompanying text. One researcher has suggested that an alternative approach would be to require the Government to match all checkoff expenditures, which would obviously have the effect of stabilizing or increasing checkoff funding notwithstanding the use of credits for individual program participants. See Walter J. Armbruster & John P. Nichols, *Commodity Promotion Policy*, Farm Foundation, available at <http://www.farmfoundation.org/news/articlefiles/816-armbruster.pdf>.

⁶⁰ See, e.g., *supra* note 23.

credit toward checkoff assessments for brand-specific advertising. Although Congress has stated that checkoff programs were “neither designed nor intended to prohibit or restrict . . . individual advertising or promotion,”⁶¹ a commodity supplier with a limited marketing budget may have no choice but to restrict its own advertising as a result of having to pay mandatory checkoff assessments.⁶²

Additionally, commodity producers may believe that commodity processors with branded products benefit disproportionately from generic checkoff advertising because of their ability to develop their brand in a way that capitalizes on generic checkoff advertising.⁶³ Although checkoff programs are designed to increase overall demand on a proportionate basis for all commodity suppliers,⁶⁴ the program’s ultimate effect on different checkoff participants can indeed vary based on various market conditions.⁶⁵

Even if checkoff programs do in fact increase overall demand on a proportionate basis for all producers, this raises another concern. Critics of checkoff programs have argued that generic advertising benefits not only commodity producers here in the U.S.,

⁶¹ 7 U.S.C. § 7401(b)(4) (2006).

⁶² Ironically, Congress has also stated that “[i]t has never been the intent of Congress for the generic commodity promotion programs . . . to replace advertising and promotion efforts of producers or processors.” *Id.* § 7401(b)(5). Unfortunately, this benevolent language appears to ignore the realities of most farmers’ limited marketing budgets.

⁶³ Clement E. Ward & Robert J. Hogan, Jr., *Beef and Pork Checkoffs: Challenges, Impacts, Alternatives*, OKLA. COOP. EXTENSION SERV., at 1, available at <http://pods.dasnr.okstate.edu/docushare/dsweb/Get/Document-1747/AGEC-588web.pdf>.

⁶⁴ See *supra* note 7 and accompanying text.

⁶⁵ Cf. Becker, *supra* note 12, at 5 (recognizing the difficulty of identifying how much a particular checkoff contributor has benefitted from the program and whether factors other than the checkoff were the source of such benefits).

but also overseas producers who export their products to the U.S.⁶⁶ Because many, if not all, of these overseas commodity producers do not contribute to the checkoff programs, domestic producers believe that they are being forced to support international competitors.⁶⁷ Thus, some may believe that the checkoff programs' goal of producing proportionate increases in demand for all suppliers can create its own inherent international free-rider problem. Although the Commodity Promotion Act authorizes the Secretary of Agriculture to assess importers of overseas commodity products "at a rate comparable to the rate . . . for the domestic agricultural commodity,"⁶⁸ it is unclear what percentage of international commodity products are actually subject to assessment.

Another source of perceived inequity among checkoff program participants is the belief that producers of certain unique versions of commodity products cannot and will not benefit from generic checkoff advertising. For example, a farmer who grows organic potatoes may believe that purchasers of organic potatoes will not likely be affected by generic potato advertising. Such a farmer would perceive the checkoff assessment to be an unfair imposition and a waste of money. Likewise, ranchers who produce Angus beef may believe that sales of their beef will not likely be affected by generic beef advertising, no matter how compelling the rodeo music associated with the advertisements may be.⁶⁹

⁶⁶ Ward & Hogan, *supra* note 63, at 1; *cf.* Becker, *supra* note 12, at 2.

⁶⁷ Ward & Hogan, *supra* note 63, at 1.

⁶⁸ 7 U.S.C. § 7415(f) (2006).

⁶⁹ The song *Hoe Down* was widely used in television advertisements produced by the National Cattlemen's Beef Association using funds from the Beef Checkoff. Family-oriented television commercials using the song suggested that a meal involving beef signified a cause for celebration, and that busy mothers will be delighted at the sight of uninvited dinner guests at their doorstep so long as a supply of beef is available in the home. See Beef Ad 1994, <http://www.youtube.com/watch?v=7VvAp-2v4o&feature=related>.

Congress has attempted to address the concerns of checkoff contributors who produce specialty versions of the covered commodity. For example, the Commodity Promotion Act specifically exempts certain producers of organic⁷⁰ commodity products. Under the Act, if an individual produces 100% organic products, to the exclusion of non-organic products, and does so on a “certified organic farm,” then the producer is “exempt from the payment of an assessment under a commodity promotion law.”⁷¹ As discussed previously, the Commodity Promotion Act also permits the use of credits toward checkoff assessments based on a commodity supplier’s expenditures for brand-specific advertising.⁷² Thus, some of these concerns regarding the unfairness of checkoff programs have been addressed by legislation.

2. Perceived Ineffectiveness of Checkoffs

One of the strongest criticisms of checkoffs is that they are ineffective, and thus the imposition of mandatory assessments is grossly unfair. More specifically, many program participants do not believe the costs of assessments justify the purported benefit. Part of the reason for this perception is that many program participants either do not understand the evaluation reports for checkoff effectiveness or they simply do not believe the reported results of such evaluations.⁷³ Another reason for this perception may be that

⁷⁰ See generally 7 U.S.C. § 6502 for the federal requirements associated with the term “organic” as used in the Commodity Promotion Act.

⁷¹ *Id.* § 7401(e).

⁷² See *supra* note 24 and accompanying text.

⁷³ See Gary W. Williams & Oral Capps, Jr. *Measuring the Effectiveness of Checkoff Programs*, CHOICES, 2nd Quarter 2006, at 76, available at <http://www.choicesmagazine.org/2006-2/checkoff/2006-2-checkoff.pdf>.

program participants are unable to observe any individual benefit from the checkoffs, but are very familiar with the mandatory costs associated with checkoffs.⁷⁴

One agricultural law scholar has argued that the perceived ineffectiveness of checkoffs is due to program participants' unrealistic expectations of the program.⁷⁵ For example, the total amount of checkoff expenditures in a given program may only amount to about one-percent of annual sales for the covered commodity.⁷⁶ If a given commodity has annual sales of \$100,000,000, then the commodity's checkoff program may only collect and spend \$1,000,000 per year to promote the commodity. Although the average checkoff program may increase annual sales by a five-to-one ratio over the amount expended by the checkoff program, this would only amount to an increase in sales of \$5,000,000 per year. When this relatively small amount of increased revenue is divided between thousands of commodity producers, it is easy to see how the return-on-investment may go unnoticed by an individual program participant.

Part of the reason for the discrepancy between checkoff participants' expectations and their subsequent dissatisfaction with checkoffs is the way these programs are presented to commodity producers. Checkoff boards have a tendency to "oversell" their programs to commodity suppliers by promising increases in demand, prices, and profitability.⁷⁷ As described above, the use of nebulous measurements of success such as benefit-to-cost ratios that average around five-to-one only compound the problem of

⁷⁴ *Id.*

⁷⁵ *See id.* at 77.

⁷⁶ *Id.*

⁷⁷ *Id.* at 78.

unrealistic expectations.⁷⁸ Commodity boards may feel pressured to exaggerate the likelihood and degree of benefits associated with checkoffs because program participants have the ability to terminate a checkoff program by voting in periodic referendums.⁷⁹ But this approach by checkoff boards can easily be perceived as disingenuous by commodity suppliers once the suppliers gain a better understanding of the actual benefits of checkoffs.

Researchers have suggested that the only way to address the problem of unrealistic expectations of program participants is by commodity boards taking a more conservative approach to explaining the potential benefits of checkoffs.⁸⁰ For example, if a commodity is experiencing depressed sales, then checkoff advertising may be able to mitigate the annual losses for commodity suppliers. But if program participants have always been promised “increased sales,” then they will have a difficult time believing or understanding that the benefit of reduced losses is the result of a checkoff program.⁸¹ Thus, commodity boards should consider more comprehensive efforts to educate commodity suppliers as to the potential risks and costs associated with checkoff programs.

⁷⁸ See *id.* at 77; see also Becker, *supra* note 12, at 5.

⁷⁹ See *supra* notes 25-27 and accompanying text.

⁸⁰ See Williams & Capps, *supra* note 73, at 77-78.

⁸¹ Cf. Ward, *supra* note 20, at 58.

B. Constitutional Arguments

Litigation involving commodity checkoff programs has been an unexpected source of significant free speech doctrine.⁸² As discussed below, there have been two primary arguments raised regarding the unconstitutionality of mandatory checkoff programs under the First Amendment. The first argument, regarding compelled speech, has been analyzed and addressed by a line of Supreme Court cases. The second argument, regarding compelled association, has not yet been addressed by the Court. Both of these issues hover around the same question: Can the Government force agricultural commodity suppliers to make financial contributions to government-sponsored checkoff programs to pay for advertising that the suppliers do not necessarily support? The below discussion will consist of a summary of the line of cases analyzing checkoff programs under the compelled speech and compelled subsidy doctrines, and a brief introduction to the arguments surrounding the issue of compelled association. Afterwards, a synthesis of the case law will be provided as well as a proposed framework for ensuring that a checkoff program is impervious to First Amendment attack.

1. Compelled Speech

The question of whether mandatory checkoff programs represent an unconstitutional form of compelled speech has been addressed by several Supreme Court cases. These cases establish a framework for analyzing whether a particular commodity checkoff program is a violation of the First Amendment's guarantee of free speech. A brief overview of the three major cases in this area will help clarify the framework.

⁸² See Buckles, *supra* note 40, at 416.

a. Glickman v. Wileman Bros. & Elliot, Inc.⁸³

In *Glickman*, the Court addressed whether marketing orders⁸⁴ that required commodity producers to contribute funds towards promotional programs that included generic advertising violated the producers' right to free speech under the First Amendment.⁸⁵ The Court held that it did not.⁸⁶ The Respondent, Wileman Brothers & Elliot, Inc., was a producer and processor of tree fruits, and was subject to fruit marketing orders that required it to pay assessments toward generic advertising of tree fruit.⁸⁷ The Respondent refused to continue paying the mandatory assessments and eventually challenged the assessments as a violation of the First Amendment.⁸⁸

The Court began its First Amendment analysis by stressing the importance of the overall statutory context in which the assessments had arisen.⁸⁹ The Court recognized that the marketing orders not only required producers to contribute to generic advertising, but also required them to be part of a large cooperative effort that subjected the producers to a number of constraints.⁹⁰ The Court noted three reasons why the regulatory scheme

⁸³ *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457 (1997).

⁸⁴ A check-off program is simply a type of marketing order. Thus, for purposes of this section, the terms will be used interchangeably.

⁸⁵ *Glickman*, 521 U.S. at 460-61.

⁸⁶ *Id.* at 472, 477.

⁸⁷ *Id.* at 463.

⁸⁸ *Id.*

⁸⁹ *Id.* at 469.

⁹⁰ The Court noted that the marketing orders at issue in this case were part of a regulatory scheme that was meant to "establish and maintain orderly marketing conditions and fair prices for agricultural commodities." *Id.* at 461. In order to stabilize the supply and price of the commodities, the regulations limited the quantity, grade, and size of the commodity that could be marketed by producers, and provided

associated with the marketing order’s assessments was distinguishable from other laws deemed to infringe on free speech: the marketing orders did not impose a *restraint* on the producers’ ability to communicate a message; the marketing orders did not compel the producers to *personally* engage in any particular speech; and the marketing orders did not compel the producers to support or endorse a particular *ideological* view.⁹¹ Rather, producers were merely required to financially support the advertising of their own products – a message that they presumably agreed with.⁹² The Court emphasized that the mere fact that the mandatory assessments reduced the Respondent’s individual advertising budget did not itself represent a violation of the First Amendment.⁹³

The Court recognized that the First Amendment does in fact prohibit the Government from requiring a person to finance another person’s political or ideological speech.⁹⁴ But a mandatory assessment for generic advertising did not “engender any crisis of conscience.”⁹⁵ Finally, the Court emphasized that the generic advertising at issue was “intended to stimulate consumer demand for an agricultural product . . . [and] that purpose is legitimate and consistent with the regulatory goals of the overall statutory

mechanisms to dispose of any commodity surplus that might lower prices on the market. *Id.* Moreover, a significant portion of the assessments collected were spent on research and development, commodity inspection procedures, and standardized packaging requirements, all in addition to generic advertising. *Id.*

⁹¹ *Id.* at 469-70.

⁹² *Id.* at 470.

⁹³ *Id.*

⁹⁴ *Id.* at 471.

⁹⁵ *Id.* at 472.

scheme.”⁹⁶ Moreover, the Court noted, producers had the ability to vote by referendum to terminate the program.⁹⁷ Thus, the Court concluded that the mandatory contributions for generic commodity advertising did not constitute an unconstitutional abridgment of free speech and that the marketing orders were merely “economic regulation that should enjoy the same presumption of validity” that the Court accords to other congressional policy judgments.⁹⁸

b. United States v. United Foods, Inc.⁹⁹

In *United Foods*, the Court once again addressed the question of whether a marketing order that required commodity producers to contribute funds towards generic advertising violated the producers’ right to free speech under the First Amendment. Unlike in *Glickman*, however, the Court held that the marketing order at issue in this case was indeed an unconstitutional infringement of free speech.¹⁰⁰

The Respondent, United Foods, was a producer of mushrooms who was subject to a mushroom marketing order that required it to pay assessments for generic mushroom advertising.¹⁰¹ The Respondent refused to pay its assessments and challenged the marketing order as unconstitutional.¹⁰² The Government argued to the Court that under

⁹⁶ *Id.* at 476.

⁹⁷ *Id.*

⁹⁸ *Id.* at 477.

⁹⁹ *U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001).

¹⁰⁰ *Id.* at 416-17.

¹⁰¹ *Id.* at 408-409.

¹⁰² *Id.*

Glickman the marketing order was constitutional.¹⁰³ The Court, however, distinguished this marketing order from the one at issue in *Glickman*. The Court stated that in this case the assessments collected under the marketing order were used almost exclusively to fund generic advertising.¹⁰⁴ Conversely, in *Glickman*, the assessments that were collected under the marketing order were used for a number of different purposes in addition to generic advertising.¹⁰⁵ Moreover, the tree fruit marketing order in *Glickman* was part of a larger regulatory scheme that controlled how the commodity was produced, sold, and marketed.¹⁰⁶ In this case, however, the mushroom marketing order did not place any rules or restrictions on how mushrooms were produced or sold.¹⁰⁷ Whereas in *Glickman* “the assessments for speech were ancillary to a more comprehensive program,” here the advertising itself was “the principal object of the regulatory scheme.”¹⁰⁸ The Court concluded that because the generic mushroom advertising appeared to “principally concern speech,” and was not “part of a broader regulatory scheme,” the *Glickman* holding did not apply.¹⁰⁹ Under these circumstances, the Court held, the mushroom marketing order and its compulsory assessments were “not permitted under the First Amendment.”¹¹⁰

¹⁰³ *Id.* at 411.

¹⁰⁴ *Id.* at 408.

¹⁰⁵ *See id.* at 411.

¹⁰⁶ *See id.* at 411-12.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 415 (citations and internal quotation marks omitted).

¹¹⁰ *Id.* at 416.

c. Johanns v. Livestock Marketing Association¹¹¹

In *Livestock Marketing Association (LMA)*, the Court addressed the familiar issue of whether a commodity producer's obligation to pay checkoff assessments to fund generic commodity advertising violated the First Amendment. But unlike in the *Glickman* and *United Foods* cases, this time the Court considered a new argument raised by the Government in support of the mandatory assessments: the "government speech" doctrine.¹¹² The Court held that when generic checkoff advertising can be deemed government speech, commodity producers First Amendment rights are not infringed.¹¹³

In *LMA*, the Respondents were a group of individuals who raised and sold cattle that were subject to the beef checkoff program.¹¹⁴ At trial in the District Court, LMA argued that its obligation to pay assessments toward generic beef advertisements was unconstitutional under the *United Foods* holding.¹¹⁵ The Government responded by arguing that the checkoff passed constitutional muster because the advertisements were government speech that is not subject to First Amendment scrutiny.¹¹⁶ The District Court

¹¹¹ *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

¹¹² In fact, this was not a "new" argument, not even among cases involving the constitutionality of commodity checkoff programs. In *United Foods*, the Respondent attempted to raise the government speech defense, but the Supreme Court found that this argument had not been properly raised in the Court of Appeals. Therefore, the Court found that it "need not address the question." *United Foods*, 533 U.S. at 417.

¹¹³ *Livestock Mktg. Ass'n*, 544 U.S. at 566-67.

¹¹⁴ *Id.* at 555.

¹¹⁵ *Livestock Mktg. Ass'n v. U.S. Dept. of Agriculture*, 207 F.Supp.2d 992, 996 (D.S.D. 2002). Interestingly, the Supreme Court's opinion stated that only about 60% of the beef checkoff's collected assessments were spent on promotional projects whereas the other 40% was spent on other projects including research and development. *Livestock Mktg. Ass'n*, 544 U.S. at 554.

¹¹⁶ *Livestock Mktg. Ass'n*, 207 F.Supp.2d at 1003.

rejected the Government's government speech argument and declared the beef marketing order to be unconstitutional under *United Foods*.¹¹⁷ The Eighth Circuit affirmed the District Court's decision.¹¹⁸

The issue before the Supreme Court was whether the government speech defense was applicable in the case.¹¹⁹ Early in its opinion, the Court noted that taxpayers are constantly compelled to financially support governmental decisions that they do not agree with, including governmental *advocacy* for particular programs or policies.¹²⁰ Moreover, the Court noted, so long as these programs and policies are justifiable, the decisions are "binding on protesting parties."¹²¹ The Court plainly stated that this type of government speech has generally been assumed to preclude individual First Amendment attacks.¹²² LMA did not dispute these basic principles of republicanism, but rather, disputed whether or not the advertising messages were in fact government speech.¹²³

LMA raised three primary arguments in dispute of whether the generic beef advertising was in fact government speech. First, LMA argued that the advertising was not government speech because the beef commodity board, a non-governmental entity,

¹¹⁷ *Id.* at 1008.

¹¹⁸ *Livestock Mktg. Ass'n v. U.S. Dept. of Agriculture*, 335 F.3d 711 (8th Cir. 2003).

¹¹⁹ *Livestock Mktg. Ass'n*, 544 U.S. at 553.

¹²⁰ *Id.* at 559.

¹²¹ *Id.* (citations and internal quotation marks omitted); *see also id.* at 574 (Souter, J., dissenting) ("To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the 'marketplace of ideas' would be out of the question.") (citations omitted).

¹²² *Id.* at 559 (majority opinion).

¹²³ *Id.* at 560.

had control over the advertising message.¹²⁴ The Court rejected this argument by citing the fact that the beef board was authorized by federal statute, was fully answerable to the Secretary of Agriculture, and that final content of all advertisements was subject to the Secretary's approval.¹²⁵ In sum, the Government retained full control over the advertisement's message and content.

Next, LMA argued that the beef checkoff cannot be the source of government speech because it is funded exclusively by contributions from beef suppliers, rather than from the general tax revenues.¹²⁶ The Court rejected this argument by stating that individuals have no First Amendment right to refuse to fund government-sponsored speech, even if the funds come from "targeted assessments."¹²⁷

Finally, LMA argued that the beef checkoff advertisements are not government speech because they are not sufficiently attributable to the Government; specifically, some of the advertisements were credited to "America's Beef Producers," as opposed to a governmental entity.¹²⁸ The Court quickly rejected this argument based on the fact that only a "sampling of promotional materials" referred to America's Beef Producers, and that this funding tagline did not sufficiently attribute the message to someone other than the Government.¹²⁹

¹²⁴ *Id.*

¹²⁵ *Id.* at 560-61.

¹²⁶ *Id.* at 562.

¹²⁷ *Id.*

¹²⁸ *Id.* at 564.

¹²⁹ *Id.* at 564-65. This same argument is discussed below in a context other than the government speech doctrine—the compelled association doctrine. *See infra* Part IV.B.1.d.

The Court thus reasoned that the beef checkoff program and its promotional efforts were a form of government speech that is not subject to First Amendment scrutiny.¹³⁰ Accordingly, the Court decided in favor of the Government and held that the beef checkoff program and its mandatory assessments were constitutional.¹³¹ The Court's reasoning suggests advertising will be deemed government speech, and survive individual First Amendment attacks, if both: (1) the Government exercises control over the advertisement's message; and (2) the advertisement is associated with a governmental program or purpose (such as a statutorily-mandated checkoff program).¹³²

d. Synthesis of Compelled Speech Doctrine

The *Glickman*, *United Foods*, and *LMA* cases establish a basic framework for assessing the constitutionality of a commodity checkoff program and its accompanying mandatory assessments to fund generic commodity advertising. Because *LMA* does not appear to have overruled *United Foods*, the below framework first discusses the *Glickman* and *United Foods* analyses and then discusses the *LMA* analysis.¹³³

First, assuming a checkoff program's advertisements do *not* qualify as government speech, then the program must be aligned with the *Glickman* and *United*

¹³⁰ *Id.* at 567.

¹³¹ *Id.*

¹³² See generally *id.* at 560-67; see also John M. Crespi & Roger A. McEowen, *The Constitutionality of Generic Advertising Checkoff Programs*, CHOICES, 2nd Quarter, at 63.

¹³³ Several legal commentators agree that *LMA* does not overrule *United Foods*. See, e.g., Beth Bryan, *Johanns v. Livestock Marketing Association: The Outsourcing of Government Speech*, 33 N. KY. L. REV. 547, 568-69 (2006); Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 557 (2006).

Foods holdings. This means that the checkoff program cannot simply consist of mandatory assessments to fund generic advertising. Rather, the checkoff program should incorporate various programs designed to increase demand for the commodity. Assessments should be used by the checkoff board not only to fund advertising, but also to fund programs such as research and development, consumer preference studies, and other programs designed to improve the commodity's quality and increase consumer demand. Moreover, the checkoff program and its advertisements should ideally be part of a larger regulatory scheme that establishes basic standards for how the commodity is produced, sold, marketed, or a combination thereof. Finally, the commodity advertising should not contain any ideological or political views, and should not restrain commodity producers from pursuing or funding their own individual advertising.

However, a checkoff program may not need to satisfy the requirements of *Glickman* and *United Foods* if the program's advertisements are deemed "government speech." The *LMA* case presented a two-part test to establish whether the checkoff program's advertisements are government speech that is not susceptible to individual First Amendment attack. First, the Government must exercise sufficient control over the advertisements' message and content. This level of control can be established by the presence of statutory authorization for the program and government oversight of the advertisements' contents. Although the commodity board in charge of ordering and funding the advertisements need not be governmental, a government official, such as the Secretary of Agriculture, must retain actual and ultimate authority to design, amend, and approve of the advertisements. Second, the advertisements' purpose must be associated with a governmental program or purpose. This means that the advertisements should not

only be associated with a government-sponsored checkoff program, but also that the advertisements should somehow be related to the statutory goal of increasing demand for the covered commodity. This latter requirement will likely be easily satisfied by most commodity checkoff programs.

2. Compelled Association¹³⁴

Although *Glickman*, *United Foods*, and *LMA* seem to have addressed the constitutionality of checkoff programs under a compelled speech analysis, the Court has yet to decide on the issue of compelled association. The Court did, however, raise the issue in *LMA*. Recall that in *LMA* the Respondents argued that the beef checkoff program was unconstitutional because some of the advertisements were credited to “America’s Beef Producers.”¹³⁵ The Respondents argued that this attribution impermissibly used “their seeming endorsement to promote a message with which they do not agree.”¹³⁶ Thus, the Respondents argued, the advertisement cannot be government speech because it was “attributed to someone other than the government.”¹³⁷ The Court rejected this argument as a means of undermining the government speech defense.¹³⁸ In doing so, the Court noted that nothing in the beef checkoff *required* attribution to America’s Beef

¹³⁴ The below analysis was motivated in part by an observation made by Prof. Roger McEowen who pointed out that the tentative language in the majority opinion of *LMA*, coupled with Justice Thomas’ concurring opinion, left the issue of compelled association unresolved. See Roger McEowen, *Supreme Court Rules That Beef Check-Off Is Government Speech; But Check-Off Litigation May Not Be Over*, AG DECISION MAKER, July 2005, available at <http://www.extension.iastate.edu/AgDM/articles/mceowen/McEowJuly05.htm>.

¹³⁵ *Livestock Mktg. Ass’n*, 544 U.S. at 564.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 564-65.

Producers.¹³⁹ The Court did mention, however, that if a checkoff program required clear and consistent attribution of advertisements to commodity producers, then this may be the basis of a constitutional challenge.¹⁴⁰ But the Court went no further with this argument because the trial court record consisted of merely a “stipulated sampling” of the advertisements.¹⁴¹ That is, the Court had no reason to necessarily believe that *all* of the checkoff advertisements *required* attribution to America’s Beef Producers.¹⁴²

This notion of a compelled association claim by commodity checkoff contributors was recognized by Justice Thomas who stated in his concurring opinion in *LMA* that the Government “may not, consistent with the First Amendment, *associate* individuals or organizations involuntarily with speech by attributing an unwanted message to them . . . whether or not the message is under the [G]overnment’s control.”¹⁴³ Justice Thomas noted that this compelled association argument was not raised by the Respondents in the Court of Appeals, but he suggested that the Respondents could and should amend their complaint to include this argument on remand to the lower court.¹⁴⁴

Justice Thomas’ “whether or not” language suggests that a compelled association claim could be raised even if the checkoff program passes constitutional muster under either or both the *United Foods* or *LMA* analyses for a compelled speech claim.

¹³⁹ *Id.* at 565.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *See id.* at 555.

¹⁴³ *Id.* at 568 (Thomas, J., concurring) (emphasis added).

¹⁴⁴ *Id.* at 569 (Thomas, J., concurring).

Accordingly, a checkoff board should not attribute any checkoff advertisements to commodity producers, and instead should use a sterile attribution such as, “*brought to you by the Beef Checkoff Program*,” in order to reduce the risk of a compelled association claim by commodity producers. This advice holds true whether the checkoff program is structured after a *United Foods*-style “larger regulatory scheme” or an *LMA*-style program deemed to be “government speech.”

V. CONCLUSION

The future of federal checkoff programs looks sunny, as the strong constitutional storms of recent years appear to have passed. But the litigious perseverance of those who oppose checkoffs illustrates the need to find ways to improve these programs. The opposition has raised numerous equitable arguments against the checkoff program, some of which can be addressed or mitigated relatively easily. For example, the current program charges assessments to so-called “first handlers,” which consist of certain commodity suppliers, processors, and importers.¹⁴⁵ But on the whole, the assessments tend to most strongly affect commodity producers who sell their products in the marketplace. Recent studies suggest that these producers believe that retailers disproportionately benefit from the promotional efforts of checkoff programs, and yet retailers are not subject to checkoff assessments.¹⁴⁶ One possible solution would be to charge retailers a small portion of the checkoff assessment – perhaps 10% of the assessment. This small amount would mitigate some of the financial burden on

¹⁴⁵ See 7 U.S.C. § 7416(a) (2006).

¹⁴⁶ Chung, et al., *supra* note 39, at 80-81.

producers and would not likely overly-burden retailers. More importantly, however, this small change would at least provide the appearance of a more equitable system, which would hopefully lessen some of commodity producers' distaste and resistance towards checkoff programs.

Another possible improvement for these programs would be to properly educate commodity suppliers on the realistic benefits of checkoff programs. Representatives from checkoff boards should explain to producers that checkoff assessments only represent about one-percent of sales and that thus even a five-to-one return on assessment expenditures will only equate to about a five-percent increase in overall sales. This conservative approach to "selling" the checkoff program will not only highlight the relatively low cost of checkoff assessments, but will also provide producers with a realistic expectation of the benefits they can expect to enjoy. This approach will build trust between producers and checkoff boards, and more importantly, will lessen the risk that producers will be disappointed.

Overall, the primary goal for improving checkoffs should be to find ways to quell producers' resistance to the program. Obviously, most producers will not be thrilled about being subject to a mandatory fee that chips away at their already-thin profit margins. But there is no need to aggravate this situation by over-promising and under-delivering. The future success of checkoff programs may well turn on whether the programs can gain the trust and support of commodity producers. Although the benefits of checkoff programs are real and tangible, these benefits must be properly and honestly communicated to commodity producers. This strategy will likely lessen the prevalence

of checkoff litigation, which is a financial burden for both the checkoff programs and commodity suppliers in general.

But no one should assume that the checkoffs will no longer be the target of angry litigants. Instead, Congress, the Secretary of Agriculture, and the checkoff boards should work together to ensure that all checkoff programs are designed to be impervious to constitutional attack. This means that all checkoffs should be designed so that any generic advertising is ancillary to an overall program incorporating multiple strategies for increasing demand for the covered commodity. Also, government officials, particularly the Secretary of Agriculture and representatives of the USDA, must remain the ultimate authority over the design and implementation of any generic advertisements. The Secretary and USDA must always ensure that these advertisements remain product-oriented and do not ever represent an ideological or political view. Finally, the checkoff advertisements should be attributed to either the Government or the commodity boards, and should not be attributed to the commodity suppliers themselves. Following this multifaceted strategy should discourage a great number of potential lawsuits based on First Amendment claims.

Commodity checkoff programs offer numerous benefits to program participants, particularly the ability to pool their resources together to pursue otherwise unaffordable programs that increase demand for their product. The checkoffs just need a bit of adjustment to ensure that commodity suppliers are more satisfied with the programs. Improved satisfaction will equate to less producer-resistance and less litigation. This will allow both checkoff programs and commodity producers to focus on what they do best.