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Legal Checkup on Checkoffs: Recent & Emerging Issues for State and Federal Checkoff Programs



DIVISION OF AGRICULTURE
RESEARCH & EXTENSION
University of Arkansas System

(479) 575-7646 **nataglaw@uark.edu**

Today's Topics

- **Background: Checkoff 101, Just The Basics**
- **Legislative Proposals: Federal Focus**
- **Pork Checkoff Litigation**
- **Freedom of Information Act (FOIA) and Checkoffs**
- **First Amendment: Past, Present, and Future**
 - *Johanns* (2005) → *Knox* (2012) R-CALF (2016 through present) → *Janus* (2018)
- **Beef and Soybeans**
 - Memorandum(s) of Understanding
 - “Redirection” of State Portion of Assessment
 - “Disqualification” of a state soybean board or beef council

Background: “Checkoff” Basics

- a/k/a Commodity Research and Promotion program
- Producer assessments on specific commodities that fund promotion, research, and consumer information activities
 - Beef and soybeans have federal-state structure
 - Examples of advertising: “Beef, It’s What’s for Dinner”; “Pork, The Other White Meat”; “Got Milk?”
- Can be federal, state, or combination of the two
 - 22 overseen by USDA Agricultural Marketing Service
 - Many created under commodity-specific federal legislation
 - Others created under Commodity Promotion, Research, and Information Act of 1996
- For USDA Boards, Secretary appoints members pursuant to applicable statute

Background: “Checkoff” Basics

- One size does *not* fit all: Many key similarities, with important differences among the various programs in **structure, funding (amount and process), operation, administration/oversight**, etc.
- Some have been around much longer than others

Background: “Checkoff” Basics

- Cattlemen’s Beef Board (CBB)
- Qualified State Beef Council (QSBC)
- United Soybean Board (USB)
- Qualified State Soybean Board (QSSB)

Background: Checkoff Basics

- **Legal issues impacting checkoff programs can have wide-ranging impacts**
 - USDA & State Departments of Agriculture
 - States’ offices of Attorneys General
 - States’ Farm Bureaus
 - Land Grant Universities
 - State and Federal Lawmakers
 - Producers
 - Commodity Purchasers
 - QSSBs and QSBCs
 - Third Party Contractors/Subcontractors

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Legislative Proposals: S. 741

- **S. 741* – “Opportunities for Fairness in Farming Act of 2017”**
 - Originally filed March 28, 2017 and sponsored by Mike Lee (R-Utah) and Cory Booker (D-New Jersey)
 - Later co-sponsored by Rand Paul (R- Kentucky), Elizabeth Warren (D- Massachusetts), and Margaret Wood Hassam (D- New Hampshire)
- **57 No Votes, 38 Yes Votes, 5 Abstained**
 - Noteworthy vote count
- **H.R. 1753 filed in House by Rep. Dave Brat**
 - Referred to House Ag Committee only

Legislative Proposals: S. 741

- Applied to all Boards administered by USDA AMS
- “A Board shall not enter into any contract or agreement to carry out checkoff program activities with a party that engages in activities for the purpose of influencing any government policy or action that relates to agriculture.”
- “Each contract or agreement of a checkoff program shall provide that the entity that enters into the contract or agreement shall produce to the Board accurate records that account for all funds received under the contract or agreement, including any goods or services provided or costs incurred in connection with the contract or agreement.”

Legislative Proposals: S. 741

- “Each contract or agreement of a checkoff program shall provide that the entity that enters into the contract or agreement *shall produce to the Board accurate records* that account for all funds received under the contract or agreement, including any goods or services provided or costs incurred in connection with the contract or agreement.”
- “A Board shall maintain any records received”

Legislative Proposals: S. 741

- “The Board shall publish and make available for public inspection all budgets and disbursements of funds entrusted to the Board that are approved by the Secretary, immediately on approval by the Secretary.”
- Also includes audit requirements for USDA Office of Inspector General and the Comptroller General of U.S.

Legislative Proposals: S. 740

- **S. 740 – “Voluntary Checkoff Program Participation Act” (115th Congress)**
 - Filed March 28, 2017
- **Key provisions:**
 - No checkoff program administered by USDA AMS shall be mandatory or compulsory
 - Checkoff programs shall be voluntary at the point of sale
- **Note: “2012 Farm Bill” vote on SA 2276 (became 2014 Farm Bill)**
 - 20 Yes Votes, 79 No Votes

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HSUS v. Vilsack/Perdue

- Originally filed in 2012 by HSUS, an individual pork producer, and the Iowa Citizens for Community Improvement (ICCI)
- In 2016, USDA Secretary approved National Pork Board purchase of 4 trademarks associated with “The Other White Meat” advertising campaign from the National Pork Producers Council (NPPC)
 - Basically, was \$60 million -- \$3 million annually, for 20 years
 - Board could terminate for any reason w/ one year’s notice, but would have to make one final \$3 million payment
 - NPPC is the trade association that lobbies on behalf of industry

HSUS v. Vilsack/Perdue

- **HSUS challenged USDA's initial and recurring annual approval on basis that:**
 - Payments resulted in the use of checkoff dollars to influence legislation (prohibited under the Pork Act)
 - USDA Secretary's decisions were "arbitrary, capricious, and contrary to law"
- **For the most part, HSUS has thus far succeeded (currently on appeal)**
- **In 2013, the federal district court dismissed the case for lack of **standing****
- **HSUS appealed, and the D.C. Circuit overruled and remanded the matter back to federal district court**
 - Parties agreed that the payments would be on hold until Secretary would review the Board's contract and the valuation of the trademarks
- **NPPC's motion to intervene was awarded in early 2016**

HSUS v. Vilsack/Perdue

- **Issue 1: Standing**
 - ". . . the Court holds that Dillenburg has demonstrated that he has suffered an injury-in-fact by virtue of the alleged misuse and waste of his checkoff dollars, and therefore, he has standing."
 - "While Dillenburg's economic loss may in fact be small and is not quantified, the facts in his declaration link his asserted loss with the challenged government activity."
 - Because Dillenburg had standing, the organizational plaintiffs (HSUS and ICCI) did as well

HSUS v. Vilsack/Perdue

- **Issue 2: 2006 Contract Challenge**
 - Held to be untimely, due to running of the 6-year statute of limitations (missed it by 11 days)
 - Note: “But the Board’s execution of the contract cannot constitute final agency action, because the Board is not the agency.”
- **Issue 3: Past payments**
 - HSUS previously agreed to dismiss with prejudice their request for retrospective relief (i.e., that Board be required to recover funds already paid to NPPC)
 - Court held the issue was moot in light of that agreement

HSUS v. Vilsack/Perdue

- **Issue 4: Whether Secretary’s approval violated the Pork Act prohibition on using checkoff funds to influence legislation or policy**
 - “. . . the Court holds that plaintiffs have shown that at least some portion of the money the Board pays NPPC . . . ultimately goes to influencing legislation” – **BUT**
 - “. . . is also not persuaded that NPPC’s use of payments it received under the contract for lobbying purposes means that checkoff funds are being spent unlawfully ‘for the purpose of influencing legislation.’”
- Contract “results in” influencing legislation vs. contract *for* lobbying services

HSUS v. Vilsack/Perdue

- **Issue 5: Whether Secretary’s decision to approve future payments based on experts’ valuations was arbitrary and capricious**
 - “Since the expert valuation relied upon by the agency does not answer the question the inquiry was supposed to answer – what is the ‘current value of the Pork trademarks?’ – and it does not, as the agency directed, calculate that value based upon ‘the cost for an organization to develop a new trademark with the same level of effectiveness . . . **the Court holds that defendant’s decision is arbitrary, capricious, and not supported by the record, and the agency is enjoined from approving any future payments based on the 2016 Review.**”

HSUS v. Vilsack/Perdue

- **The parties have appealed to the D.C. Circuit**
 - HSUS, ICCI, and producer filed brief in November 2018
 - USDA and NPPC filed briefs a week ago (2/12/2019)
- **Administrative law heavy briefs filed by the parties**

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FOIA & Checkoffs

- Remember: Federal and state FOIA laws
- FOIA is an issue that sometimes arises in “government speech” context
- See Government Accountability Report, Agricultural Promotion Programs: Status of Freedom of Information Act Requests, GAO-18-55R (Oct. 24, 2017)

FOIA & Checkoffs

- Significant efforts made in 2016-2017 to have language in appropriations bill that would state that checkoff boards are not subject to FOIA
- 2 court decisions to highlight:
 - *Robbins v. New York Corn & Soybean Growers Ass'n, Inc.* 244 F.Supp.3d 300 (N.D. New York)
 - *Physicians Committee for Responsible Medicine v. USDA and National Cattlemen's Beef Association*, 316 F.Supp.3d 1 (D. D.C. 2018)

FOIA & Checkoffs: *Robbins*

- New York Corn & Soybean Growers Ass'n was the Qualified State Soybean Board (QSSB) under the federal Soybean Act
- Court held that the board was not a federal agency under the Administrative Procedure Act or Mandamus Act, **and thus not subject to FOIA**
- The association argued that “as a private entity, it cannot be transformed into a federal agency because the federal government does not have substantial control over its operations”
- Court: “the level of involvement by USB or the Department of Agriculture does not confer federal agency status on NYSCGA”

FOIA & Checkoffs: *Physicians Committee*

- Physicians Committee alleged that USDA and NCBA violated FOIA when it withheld/redacted documents regarding the dairy and beef checkoff requested by Committee
- Argument: beef checkoff records created by NCBA qualify as “agency records” and that USDA has violated FOIA by refusing to search NCBA’s files for responsive records
- Note: this issue was before the same judge that decided the HSUS v. USDA pork checkoff case

FOIA & Checkoffs: *Physicians Committee*

- “Thus, the question before the Court is again a narrow one: whether the documents created by NCBA are subject to FOIA. This time, the answer is no.”
- Court has jurisdiction to enjoin agency from withholding records and to order production of records only if the agency has improperly withheld “agency records”
 - “Agency records” not defined in the statute
- Held: The records at issue were not “agency records” subject to disclosure under FOIA because USDA had not “obtained” records created by NCBA
- Held: The records were not “agency records” because USDA did not “control” NCBA

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First Amendment: “Government Speech” vs. Private Speech

- **Core argument:** First Amendment violated because producer is required to pay for/subsidize speech of a private actor with which that producer disagrees
 - i.e., Producer who does not support generic beef advertising
- Significant history of court challenges in this area
 - Landmark decision: *Johanns v. Livestock Marketing Association*, 125 S. Ct. 2055 (2005)
- Most recent is *Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America v. USDA*

Johanns

- *Johanns v. Livestock Mktg. Ass'n*
- Whether the federal assessment forced certain producers to subsidize speech with which they disagreed
 - *Glickman v. Wileman Brothers & Elliot*, 521 U.S. 457 (1997)
 - *United States v. United Foods*, 533 U.S. 405 (2001)
- A funny thing happened on my way to 2005 . . . -- *Johanns*
- *Johanns*: Supreme Court held that the speech at issue was “government speech”, based in large measure on the degree of “effective control” the federal government had over the Beef Board

Post-Johanns

- *Avocados Plus Inc. v. Johanns*, 421 F.Supp.2d 45 (D. D.C. 2006) (Relying on *Johanns*, rejected gov't speech challenge to Hass Avocado Program)
- *Cricket Hosiery, Inc. v. United States*, 30 C.I.T. 576 (2006) (same regarding Cotton Research and Promotion Act)
- *American Honey Producers Ass'n v. USDA*, 2007 WL 1345467 (E.D. Cal. 2007) (same regarding honey program)

Government Speech & Checkoffs

- *Paramount Land Co. LP v. California Pistachio Comm'n* 491 F.3d 1003 (9th Cir. 2007) (appeal of preliminary injunction)
- Relied on *Johanns*, viewed California program as government speech
 - California Secretary appointed one of 9 Commission members
 - Secretary had to concur in nomination and election procedures
 - Secretary authorized to attend/participate in meetings
 - Commission must submit to Secretary for his concurrence “an annual statement of contemplated activities”
 - Secretary has authority to “correct or cease any existing activity or function that” violates law or against public interest
 - Secretary could suspend or discharge the Commission’s President
 - Dissatisfied growers could file grievance with Secretary
 - Secretary approves annual budget before Commission can disburse

Government Speech & Checkoffs

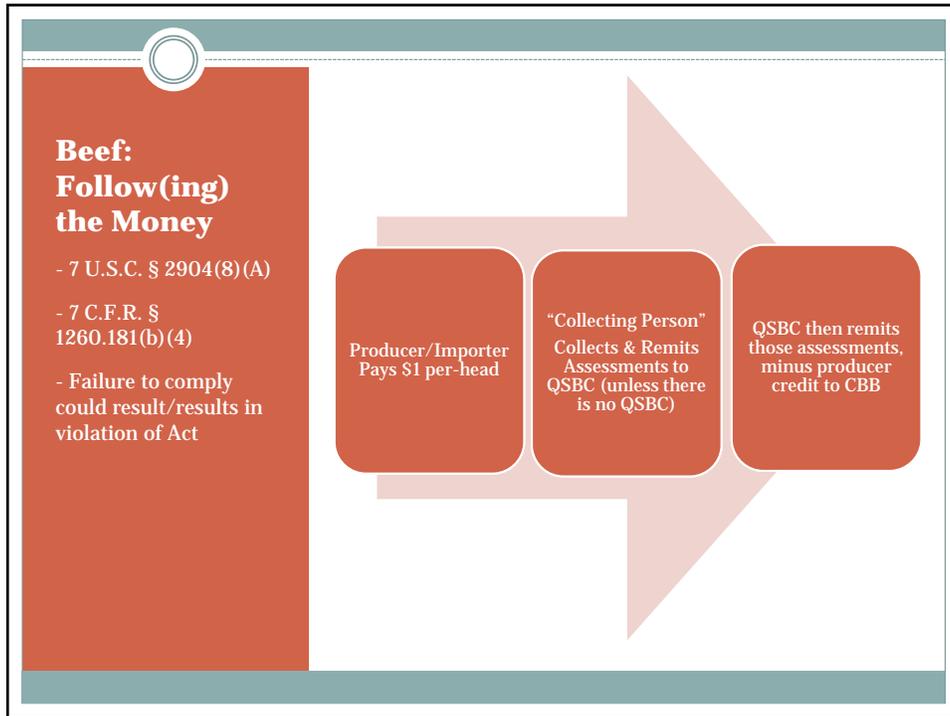
- *Delano Farms Co. California Table Grape Com'n*, 586 F.3d 1219 (9th Cir. 2009)
- Relied on *Johanns* and *Paramount Land*, viewed California program as government speech
 - Commission is established by Act of legislature
 - California Secretary appoints and can remove Commissioners**
 - “State possesses additional oversight powers over the Commission” by requiring Commission to “keep accurate books, records, and accounts of all its dealings”
 - Records open to review by the state
 - Secretary did NOT have power to “correct or cease” Commission activity
 - Secretary did NOT have authority for final approval of Commission plans/projects
 - Commission could recommend to Secretary that its operation be suspended
 - Focus was on statutorily-authorized control, not whether that authority was exercised

Knox v. Service Employees Union (2012)

- *Knox, v. Service Employees Union*, 567 U.S. 298 (2012)
- Did not involve with checkoff programs
- Dealt with public service union dues
 - Chargeable (collective bargaining) and Non-chargeable (political activity)
- U.S. Supreme Court held in *Knox* that labor unions violate the First Amendment rights of dissenting individual if it levies an assessment for political/ideological speech without giving the dissenting individual the ability to “opt in”

Janus v. AFSCME

- *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S. Ct. 2448 (June 27, **2018**)
- Landmark decision that went even farther than *Knox* to hold that the free speech rights of nonmembers are violated when they are forced to subsidize private speech on matters of “substantial public concern”
- “. . . neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, *unless the employee affirmatively consents to pay*”



R-CALF

Plaintiff's Core Arguments:

- Montana Beef Council is a private entity due to lack of federal oversight and, therefore, state-retained assessments are not government speech under *Johanns* and are thus unconstitutional
- “Moreover, on information and belief, neither USDA nor the Montana Beef Council has established a procedure by which a cattle producer who disagrees with the Montana Beef Council’s message can request that the complete amount of his assessments be directed to the Beef Board, a body controlled by the federal government.” (¶ 74)
 - *Knox* and *Janus* decisions are relevant here

Source: R-CALF v. USDA, Civ. No. 4-16-cv-000141-BTM-JTJ (D. Mont. May 2, 2016)

R-CALF

- On December 12, 2016 Magistrate issued Findings & Recommendations largely in favor of *R-CALF*
- On December 23, USDA announces Memorandum of Understanding between USDA AMS and Montana Beef Council
- On June 21, 2017 the federal district court adopts the Magistrate’s findings and issued preliminary injunction, stating

R-CALF

- “Defendants are enjoined from continuing to allow the Montana Beef Council to use the assessments that it collects under the Beef Checkoff Program to fund its advertising campaigns, unless the payer provides prior affirmative consent authorizing the Montana Beef Council to retain a portion of the payer’s assessment.”
 - Consider this in light of *Knox* and, now, *Janus* decisions

R-CALF



- Preliminary injunction is appealed to the 9th Circuit Court of Appeals and heard before a 3-judge panel
- In a 2 to 1 decision, the 9th Circuit affirmed the federal district court decision (Apr. 9, 2018)
- Case returned to the federal district court, which is where it is today

R-CALF



- R-CALF now seeks a permanent injunction in Montana, as well as in:
Hawaii, Indiana, Kansas, Montana, Nebraska, Nevada, New York, North Carolina, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, and Wisconsin
- Montana Beef Council, Pennsylvania Beef Council, and Texas Beef Council (and three individual plaintiffs) have intervened
- Agreed upon timeline for discovery and briefings runs through August 28, 2019

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- **All 3 of these are currently integral to ultimate outcome of *R-CALF* litigation:**
 - Memorandum(s) of Understanding
 - “Redirection” of State Portion of Beef Checkoff Assessment
 - “Disqualification” / “Decertification” of a state soybean board or beef council

Memorandum(s) of Understanding

- **MBC-AMS MOU became effective December 22***
- **Requires Pre-approval by AMS of:**
 - “any and all promotion, advertising, research, and consumer information plans and projects”
 - “any and all potential contracts or agreements to be entered into by MBC for the implementation and conduct of plans or projects funded by checkoff funds” that can only become effective with AMS approval

Memorandum(s) of Understanding

- **Can be terminated if both parties agree to do so**
- **Requires council “to submit to AMS such additional information as may be requested.”**
- **“If at any time MBC fails to comply with the terms of this MOU, MBC acknowledges and agrees that AMS may direct the Beef Board to de-certify MBC as a QSBC, and, in the event of such de-certification, MBC shall stop receiving national checkoff funds.”**
 - Note that this is for failure to comply with MOU, rather than a violation of the Act or the Order

Memorandum(s) of Understanding

MOU also binds all third parties who/that contract with the MBC:

- “The party or parties contracting with MBC shall . . . provide . . . such other reports as AMS may require” (in addition to an accounting of all funds received and expended, periodic reports of activities conducted, and maintenance of “accurate records of all transactions under the contract”)
- “The Secretary or agents of the Beef Promotion Operating Committee or the Beef Board may audit periodically the records of the contracting party.”

“Redirection” for Beef and Soybean Assessments:

- Allows producers to “bypass” state beef council or state soybean board and send entire assessment to CBB/USB
- Results in loss of assessment that would have otherwise have been retained and expended by the state beef council or soybean board
- Premised on interpretation that payments to QSBCs and QSSBs is voluntary

Redirection: Policy & Proposed Rule

AMS states that the proposed rule applies when:

“(1) There is no state law requiring assessments to a state soybean board or state beef council, or

(2) There is a state law requiring assessments, but the state law allows for refunds.”

Beef: Follow(ing) the Money

- 7 U.S.C. § 2904(8)(A)

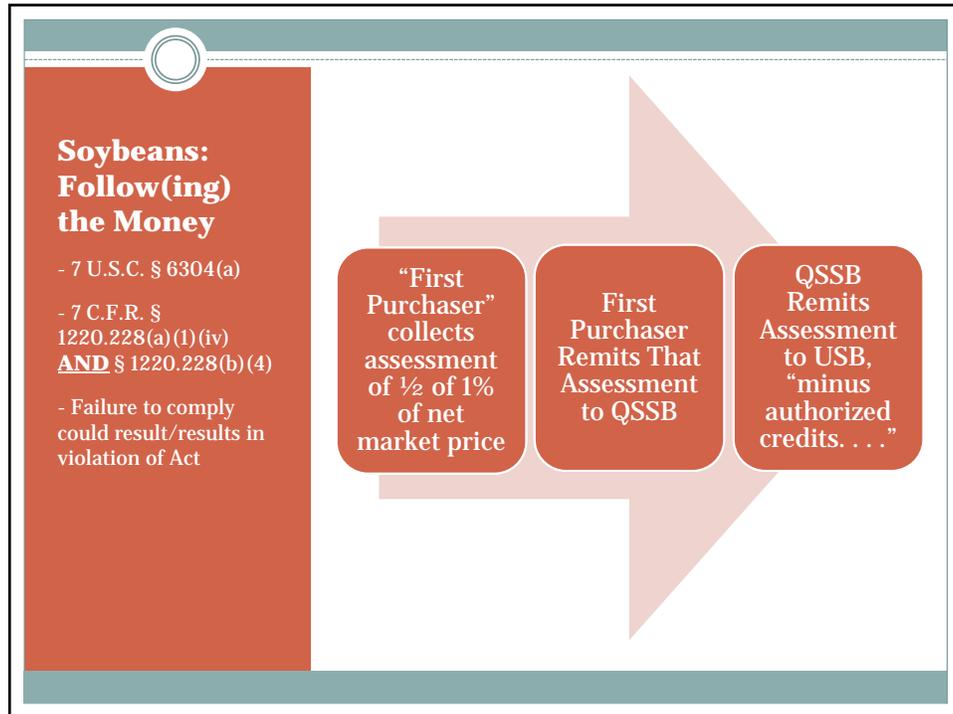
- 7 C.F.R. §
1260.181(b)(4)

- Failure to comply
could result/results in
violation of Act

Producer/Importer
Pays \$1 per-head

“Collecting Person”
Collects & Remits
Assessments to
QSBC (unless there
is no QSBC)

QSBC then remits
those assessments,
minus producer
credit to CBB



Proposed Redirection Rule: One Example

Actual language of Proposed Rule for Soybeans:

“Entities not authorized by State statute but organized and operating within a State and certified by the Board pursuant to paragraph (a)(2) of this section must provide producers an opportunity for a State refund and must forward that refunded portion to the Board.”

- A refund that likely was not already available, and one that the producer will never be able to obtain or retain
- However, AMS states that a/the reason for the rule is to “close this gap” created when a producer receives a refund

De-Certification/Disqualification: Summary

- **De-certification or Disqualification terminates the existence of a QSBC or QSSB**
 - All producer assessments go to CBB/USB in this instance
- **Standards unclear for when this applies, and who makes the decision**
 - Not affirmatively addressed in the Beef Act or Order
- **Is the determination subject to the Administrative Procedures Act?**

Comments/Remarks

- **Expect general shift towards increased government oversight at state and federal levels**
- ***Johanns* (government speech via oversight) vs. *Janus* (prior affirmative consent)**
- **Recall that 9th Circuit has not yet considered substantive merits of *R-CALF***
- **Is “research” equal to “promotion” in terms of government speech consideration?**

Comments/Remarks

- Expect FOIA issues to persist
- *Delano Farms Co. v. California Table Grape Commission*, 417 P.3d 699 (2018) (upheld constitutionality under state Constitution)

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