

CHARACTERISTICS OF COMMODITY  
CHECK-OFF PROGRAMS

By

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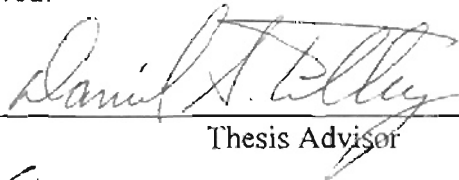
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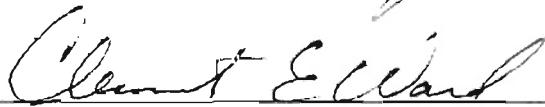
Submitted to the Faculty of the  
Graduate College of the  
Oklahoma State University  
in partial fulfillment of  
the requirements for  
the Degree of  
MASTER OF SCIENCE  
December, 2003

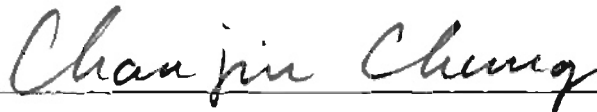
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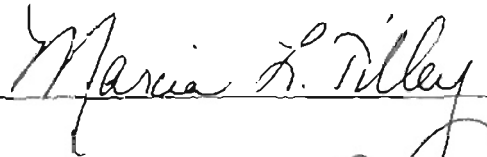
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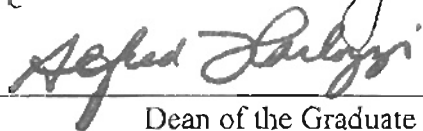


Thesis Advisor









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## Acknowledgements

I wish to express my sincere appreciation to my major advisor, Dr. Daniel Tilley for his intelligent supervision, constructive guidance, inspiration, and friendship. I have enjoyed our long discussions and have learned so much from him. I would also like to extend my appreciation to my other committee members Dr. Chanjin Chung, Dr. Marcia Tilley, and Dr. Clem Ward. Each of their guidance, assistance, and encouragement has been invaluable.

In addition, my thanks goes out to the Oklahoma State University Department of Agricultural Economics for the support and guidance with which I have been provided over the last four years.

My heartfelt appreciation goes to those commodity check-off programs that have supported my research. In particular, I would like to thank the Oklahoma programs who provided me with specific guidance and advice, the Oklahoma Beef Council and Mr. Mike Kelsey, the Oklahoma Pork Council and Mr. Roy Lee Lindsay, and the Oklahoma Wheat Commission and Mr. Mike Hodges. Without all of their support and assistance, this research would not have been possible.

And last, but certainly no least, I would like to thank my fiancé, Mark Provost. Without his invaluable suggestions to my research, his strong encouragement at times of difficulty and frustration, and his love, support and guidance, I would not have made it through this process.

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## Chapter 1.

### Introduction and Background

It doesn't really matter why marketing orders were created. What matters is whether the organizations have changed with the times; whether they have adapted to meet the needs of the present; whether they anticipate the needs of the future.

-Kathleen Nave, Executive Vice President,  
California Table Grape Commission

In two rulings, the United States Supreme Court has decided cases to determine whether assessments to support agricultural commodity marketing promotions violate commercial speech and freedom of speech rights afforded under the First Amendment of the United States Constitution.

On June 25, 1997, the Supreme Court ruled in *Glickman, Secretary of Agriculture v. Wilman Brothers and Elliott, Inc.* regarding the California tree-fruit marketing order. The five to four ruling stated that generic advertising in marketing orders, when part of a larger, more comprehensive marketing program, is indeed constitutional (*Glickman*). A marketing order can be defined as a mandatory program which may allow (1) quality standards; (2) standardized packages and containers; (3) regulated flow of product to market; (4) reserve pools; and/or (5) production research, marketing research and development, and advertising and which was created under the Agricultural Marketing Agreement Act of 1937. Conversely, on June 25, 2001, exactly four years later, the same Supreme Court, in a six to three ruling in *United States and Department of Agriculture v. United Foods, Inc.*, ruled that the mandatory assessments under the Mushroom Research, Promotion, and Consumer Information Order are not constitutional. The Court declared that the generic advertising in stand-alone research and promotion programs, or a



program which conducts promotion, market research, production research, or new product development only, is not constitutional (*United Foods*).

These two major rulings have had a far-reaching impact on other federal marketing orders and research and promotion programs. As of October 2003, two of the USDA's most prominent research and promotion programs, the Beef Promotion and Research Act and the Pork Promotion, Research and Consumer Information Act, have both been found unconstitutional by United States District Courts of Appeals. Hearings are currently under way for other federal programs, including the research and promotion programs for honey and watermelons and marketing orders for grapes and citrus, just to list a few. As the Supreme Court rulings are obviously impacting the marketing of agricultural products on a federal level, examining the impact on the state level is also very important, as numerous state-level programs have also faced constitutional litigation.

While there has been research examining the constitutionality of federal programs (Crespi), there is no similar research being done with state orders. In light of these rulings and subsequent changes, information on the future of the state programs, particularly those state programs created through stand-alone state-implemented legislation, is needed.

### **Origin of Marketing Orders and Research & Promotion Programs**

The great depression brought about many changes in agriculture. One important change was the passage of several acts that affect agricultural marketing today. As agricultural commodity prices were falling drastically, producers began forming

voluntary marketing programs using funds that they collected voluntarily in an attempt to “help” themselves. However, these programs weren’t successful because a number of producers chose not to participate in the program, yet non-participants still received the benefits of improved prices and sales. Because most agricultural products are homogenous commodities, free-rider problems exist as producers who don’t pay program costs can still experience its benefits. The free-rider problem prompted the government to pass marketing acts in an attempt to restore market stability to agriculture (Forker and Ward page10).

The Agricultural Adjustment Act of 1933 and the amended Agricultural Adjustment Act of 1935 marked the beginning of federal and state commodity check-off and promotional programs. From there, the Agricultural Marketing Agreement Act (AMAA) of 1937 (7 U.S.C. 601) was passed. The AMAA, along with numerous state acts, authorized the establishment of both federal and state marketing orders. The AMAA of 1937 allows four types of regulatory schemes: (1) restrictions on the quantity of a commodity that can be sold, either through marketing allotments or reserve pools, (2) limits on the grade, size, or quality of the commodity, (3) regulation of packaging and container sizes, and (4) some limited generic promotion and advertising allowances (Agricultural Marketing Agreement Act of 1937). The Act was amended in 1954 through the Advertising Amendment to include “marketing development projects.” These projects included advertising and promotion for a broad range of commodities (Agricultural Act of 1954, Section 401(c)). This act containing these four regulatory schemes, and the later addition of research and promotion, has been the basic guideline of

most marketing orders, marketing agreements, and research and promotion programs created since the 1930's.

While similar programs have existed at the local, state, and regional levels for more than fifty years, federal research and promotion programs came into existence years later. Research and promotion programs are generally supported by legislation that allows mandatory assessment of a specific commodity for the purpose of supporting research and promotional activities. Unlike marketing orders, research and promotion programs generally do not allow for (1) restrictions on the quantity of a commodity that can be sold, either through marketing allotments or reserve pools, (2) limits on the grade, size, or quality of the commodity, or (3) regulation of packaging and container sizes, which are allowed under most marketing orders (Agricultural Marketing Agreement Act of 1937). In order to improve inter-state coordination, encourage participation from all individuals who benefit from the programs, and increase funding, agricultural industry groups began to seek federal legislative authority to establish these mandatory national check-off programs. The first of these federally authorized programs was created in 1954, but most were enacted in the 1980s and 1990s (USDA, AMS 2).

### **Differences Between Marketing Orders and Research and Promotion Programs**

While at a glance these two types of promotion programs, marketing orders and research and promotion programs, may appear to be similar, their differences can be drastic and important. These differences appear to be the reason the U.S. Supreme Court ruled mandatory assessments for promotional programs constitutional when part of a

marketing order, yet unconstitutional when part of a stand-alone research and promotion program.

The United States Department of Agriculture (USDA) defines a marketing order as “a legal instrument authorized by the United States Congress through the Agricultural Marketing Agreement Act of 1937” (USDA, AMS 1). Under this very broad definition, there are two different types or categories of marketing orders. A strict marketing order is “binding on all individuals and businesses who are classified as ‘handlers’ in a geographic area covered by the order.” A marketing agreement is “binding only on handlers who are voluntary signatories of the agreement.” A research and promotion program is formed to “help expand, maintain, and develop markets for individual agricultural commodities in the United States and abroad” (USDA, AMS 1). While these marketing support programs have some similar components, they are also different in many respects.

Marketing orders and agreements are designed to help stabilize market conditions for agriculture products. The goals of these supports are diverse. Their goals tend to be to “(1) maintain the high quality of produce that is on the market, (2) standardize packages and containers, (3) regulate the flow of products to the market, (4) establish reserve pools for storable commodities, and (5) authorize production research, marketing research and development, and advertising” (USDA, AMS 1). These programs tend to require involvement through these regulations such that producers create a cooperative-like relationship and an anti-trust exemption exists

Research and promotion programs are similarly designed to help stabilize market conditions for agriculture products and to maintain, develop, and expand these markets.

However, here the similarities stop. Research and promotion programs are designed to conduct promotion, market research, production research, and new product development (USDA, AMS 2). These programs do not allow grade, quality, quantity, size, or packaging restrictions as most marketing orders and agreements do. Thus, research and promotion programs are not provided with an anti-trust exemption. This important difference appears to be the reason why the Supreme Court allowed mandatory assessments in the marketing order, but did not allow mandatory assessments in support of the promotional activities present in the research and promotion program.

### **Other Research**

Most of the research being done with marketing orders and research and promotion programs focuses on the impacts of generic advertising and how funds collected should be distributed and used (L'errero, *et al.*).

In the two Supreme Court cases involving agricultural marketing programs, the producer side has made arguments that “generic advertising also hurt growers with high-quality products by fostering the idea that all products were the same, thus lowering product differentiation in consumers’ minds” (Crespi and Marette, page 691). In investigating whether generic advertising does lower product differentiation among competing brands of the same good, Crespi and Marette conclude that there is evidence that “generic advertising has a slight differential effect on the perceived qualities of different brands.” And so, “marketing boards should not take for granted that their generic advertising is truly generic” (Crespi and Marette, page 700).

In another area of research, Wohlgenant examines how funds collected from marketing and research and promotion programs should be spent. These funds can be spent in one of two ways. The funds can be spent on promotion, which would theoretically shift the demand curve. Or, the funds can be spent on research, which should shift the supply curve. The research determined that “producers benefit more from research-induced decreases in production costs and promotion than from research-induced decreases in marketing costs” (Wohlgenant, page 649). However, Chung and Kaiser comment on Wohlgenant’s research and argue that some of the original assumptions in his model are inaccurate. They argue that when curve shifts are pivotal, rather than parallel, “the consumer promotion benefits producers more than research activities” (Chung and Kaiser, page 593). All authors agree that further research is necessary before any recommendations are made regarding the use of funds in these check-off programs.

While some research has been done into the value of generic advertising and the use of funds collected from check-off programs, the research set forth in this project is different in that it examines the characteristics of market orders, research and promotion programs, and other commodity check-off programs and individual state programs.

### **Objectives of Research**

The objectives are to:

1. Determine the differences between marketing orders and research and promotion programs and how these differences can help in understanding the Supreme Court’s two different rulings.

2. Determine the characteristics of state marketing orders and research and promotion programs and include a list of all states and their respective orders and programs.
3. Determine most likely courses of action should specific programs or orders be declared unconstitutional.

The research set forth in these objectives is unique in that no one no has examined possible policy alternatives that would avoid constitutionality problems. And, more importantly, no one has examined the characteristics of marketing orders and research and promotion programs and how state programs, which have been somewhat overlooked up to this point, could be affected by the Supreme Court's decisions.

## Chapter 2.

### Litigation Background

Over the past decade, there has been much marketing order litigation as some producers and handlers argue that these promotional programs violate their First Amendment right of freedoms of speech, or the freedom not to be compelled to speak, and association. Some of the most important and relevant precedents to the commodity-check-off cases are discussed below.

#### Precedent Setting Cases

Two non-agricultural and unrelated cases set the precedents used by district courts and the Supreme Court in later commodity check-off program rulings. These two particular cases are *Abood v. Detroit Board of Education* and *Central Hudson Gas & Electric v. Public Service Commission of New York* and are discussed below.

#### *Abood v. Detroit Board of Education – 1977*

Some Detroit school teachers, one in particular named D. Louis Abood, objected to an agreement between the Detroit Federation of Teachers (Union) and the Detroit Board of Education. The provision forced teachers to pay a service charge to the Union, regardless of Union membership. Refusal to pay this charge would result in termination. However, Abood and some other schoolteachers objected to being forced to fund this collective bargaining. The Supreme Court ruled, in May of 1977, "if the government deems labor relations to be important in maintaining a healthy economy, then compelling payment for collective bargaining is valid even if some members disagree with the



collective bargaining" (*Abood*). However, the court stated freedom of speech includes the right not to be compelled to speak, and so, the Union could only use a member's money in a way that was relevant or germane to the purpose of their compelled association. Any other use of the collected money would be a violation of that member's freedoms of speech and association.

In addition to ruling on the issue of commercial speech represented in this case, the Supreme Court commented, in its opinion, on the differences between commercial speech and government speech. In writing for the Court, Justice Powell explained that

Compelled support of private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected speech in this context (*Abood* page 259).

This distinction between government speech and private, commercial speech may have a great impact on future commodity check-off litigation.

#### *Central Hudson Gas & Electric v. Public Service Commission of New York – 1980*

As part of its energy conservation policy in 1977, the Public Service Commission of New York made a permanent ban on all advertising that promoted electrical usage. Informational and energy conservation advertising could still be used by power companies, but they could not encourage or promote the usage of electricity. Central Hudson Gas & Electric Corporation felt that this promotion restriction violated their right to freedom of speech afforded to them under the First Amendment, and filed a petition

(*Central Hudson*). In making its decision on this case, the Supreme Court created the three-prong test for appropriate commercial speech cases. If the contested speech is both lawful and not misleading, it must pass all of the following three prongs to be considered a constitutional regulation. (1) Does the Government's program involve a substantial government interest? (2) Does the regulation directly advance that governmental interest? (3) Is the Government's program narrowly tailored to minimize adverse impacts on First Amendment rights? In the case of *Central Hudson*, the Court determined that the new regulation did pass the first two prongs; the state did have a substantial interest in energy conservation and this ban did support that interest. However, the Court found that a less restrictive advertising ban could have been implemented, so the regulation failed the third prong of the test. For these reasons, the regulation was ruled unconstitutional.

While this case seems rather unimportant, the three questions created in this case would help determine the constitutionality of numerous commercial speech cases in the future.

### **Commodity Check-off Cases**

It was only a matter of time before the Agricultural Marketing Agreement Act of 1937, the Advertising Amendment of 1954, and this handful of First Amendment cases combined to start a long line of commodity check-off and promotion program litigation. Some of the most important and relevant of these cases are discussed below.

#### *United States v. Frame* - 1989

The Beef Research and Promotion Act of 1985 created the Beef Research and Promotion Order, a research and promotion program established to increase the demand

for beef. The Order began collecting its one-dollar assessment from the purchase price of each head of cattle sold on October 1, 1986. L. Robert Frame, Sr. operated a cattle auction business and raised cattle in Pennsylvania and refused to pay his assessment. The USDA took action against Frame. The case was first heard in the United States District Court for the Eastern District of Pennsylvania. Frame was attacking the constitutionality of the Act by claiming that the program (1) was an unlawful delegation of Congress' taxing power, (2) violated the Fifth Amendment right of equal protection, (3) violated the First Amendment rights of freedoms of speech and association, and (4) exceeded the limits of expressed or implied power of Congress (*Frame* page 1479). The district judge rejected Frame's arguments and upheld the constitutionality of the Beef Research and Promotion Order. Furthermore, the judge ordered Frame to pay \$66,625.11 in uncollected assessments and late fees.

Frame then appealed his case and it was heard in Third Circuit Court of Appeals on July 11, 1989. In examining the *Frame* case, the court of appeals has created an important precedent in ruling on government speech. While this information was rather unimportant in making the ultimate decision in the *Frame* case, it is believed that it will be used in deciding future commodity check-off cases. The court of appeals determined that "the Cattleman's Board seems to be an entity 'representative of one segment of the population, with certain common interests'" (*Frame* page 1133). The court explained that while the members of the Cattleman's Board and the Operating Committee are appointed by the Secretary of Agriculture, they are "not government officials" (*Frame* page 1133). And so, even though the Beef Research and Promotion Program is

extensively supervised by the Secretary of Agriculture, "it does not transform this self-help program for the beef industry into 'government speech'" (*Frame* page 1133).

Ultimately, the court of appeals declared that, although *Frame's* First Amendment rights were implicated, this did not, in itself, justify nullifying the Beef Promotion and Research Act. The court claimed that "the right of free speech and association are not absolute" and that the Act passed the *Central Hudson* test because the government "enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the Act in a way that infringes on the contributor's right no more than necessary to achieve the stated goal" (*Frame* page 1133). *Frame* appealed the court's decision to the Supreme Court, but was denied another hearing.

#### *Cal-Almond, Inc vs. United States Department of Agriculture -- 1993*

The Almond Order is different than most other marketing orders as it allows handlers to "be reimbursed in full, up to the amount of the assessment, for advertising their own products provided that the advertising met requirements set by the Board" (*Crespi*, page 23). Unfortunately for some producers, some of these requirements were rather arbitrary. Two examples of these arbitrary "requirements" are that fifty percent of the product being advertised must be almond and sales outlets that advertised almonds must be operated by the almond handler. In 1984, several almond production and sales firms refused to pay their assessment, as they believed the Order violated their First Amendment rights of freedom of speech and association. The case was heard before the Ninth Circuit Court of Appeals in January 1993.

The court found this regulation unconstitutional, as it failed two of the three prongs of the Central Hudson test. The court claimed that the order failed prong two as the government failed to show that generic advertising, rather than the individual's advertising, directly advanced the government's interest. The order also failed the third prong as the USDA failed to provide justification for the requirements that handlers must meet to receive credit for their advertising and so the order was not sufficiently narrowly tailored. And so, the Court of Appeals found the order unconstitutional.

However the appeals court's decision was reversed and the order was ruled constitutional after the Supreme Court's ruling in *Wileman* (see below).

*Glickman, Secretary of Agriculture vs. Wileman Brothers & Elliott, Inc. - 1997*

Two years after the court of appeals made its decision that the Almond Order was unconstitutional, a group of California nectarine, peach, and plum growers appealed their case to the Ninth Circuit Court of Appeals. These handlers also believed that the marketing order regulating California nectarines, peaches, and plums was a violation of their First Amendment right to freedom of speech. In a decision similar to that found in *Cal-Almond*, the same court of appeals ruled that this marketing order regulation violated the handlers' First Amendment rights because it failed the second and third prongs of the Central Hudson test. Even though the advertising did increase sales, the Government failed to prove that it was any more effective than individual advertising. Additionally, the regulation was not narrowly tailored because (1) it failed to give producers and handlers credit for their individual advertising and (2) it only regulated tree-fruits grown in California, rather than being a national program. The Secretary of Agriculture

appealed the court's decision to the Supreme Court and testimony began in December of 1996 (517 U.S. 1232).

In its five to four ruling with Justices Stevens, O'Connor, Kennedy, Ginsburg, and Bryer as the majority and Souter, Rehnquist, Scalia and Thomas as the dissenters, the Supreme Court reversed the court of appeals' decision. Instead, they addressed the legal question of whether being compelled to fund advertising violates First Amendment rights or is a question of economic policy.

The Supreme Court held that advertising is designed to serve the producer's and handler's collective interest in promoting the sale of a particular product and that the advertising in question did not promote any particular message with which the respondents disagree. The court claimed that this was not an example of compelled speech because the regulation did not "require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they 'would prefer to remain silent,' or require them to be publicly identified or associated with another's message" (*Wileman* page 471).

When looking at precedents to use in this situation, the court ruled out the use of *Ahond* because paying for assessments did not create any crisis of conscience; just because the objectors believed the funds were not being well spent did not mean that they had a First Amendment complaint. Additionally, the court ruled out the use of *Central Hudson* because this marketing order had three characteristics that distinguished it from other regulations that violate the First Amendment. (1) Marketing orders do not prevent producers from communicating any message to any audience (which was not the case in

*Central Hudson*). (2) Marketing orders do not compel the handlers to engage in any actual or symbolic speech. (3) Marketing orders do not compel the handlers to endorse or finance any political or ideological views (which was not the case in *Abond*). Therefore, Justice Stevens stated, “Thus, none of our First Amendment jurisprudence provides any support for the suggestions that the promotional regulations should be scrutinized under a different standard from that applicable to the other anticompetitive features of the marketing orders” (*Wileman* page 477).

The majority of the court concluded that the handlers are compelled to fund generic advertising as a part of a broader, collective enterprise in which their freedom to act independently was already constrained by the regulatory scheme. To quote Justice Stevens again, “In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments made by Congress” (*Wileman* page 477).

However, in writing the dissenting opinion, the three minority justices brought up some interesting points. Justice Souter, in writing the minority opinion, explains that,

All ideas having even the slightest redeeming social importance have the full protection of the First Amendment. Compelling speech is as suspect as suppressing it and is typically subject to the same level of scrutiny. The respondents in this case disagree with the message they are funding, however the First Amendment allows producers to tout their wares as they see fit, so long as they don't mislead (*Wileman* page 479).

In addition, the dissenters did find the *Central Hudson* test applicable. However, they declared that the marketing order failed all three prongs. It failed the first prong because “authorization of compelled advertising is so random and so randomly implemented, in light of the Act's stated purpose, as to unsettle any inference that the Government's asserted interest is either substantial or even real.” The regulation fails the

second prong because the Government failed to prove that generic advertising does a better job of increasing consumer demand than an entirely voluntary system would. Additionally, the marketing order failed the third prong as it is not sufficiently narrowly tailored because it lacks a credit system, which would reimburse producers and handlers for their individual advertising (*Wileman* page 502-504).

Some of the reasoning used by the four dissenters in *Wileman* would become relevant when the Supreme Court made an opposite ruling in the next commodity check-off case heard before the nine justices.

*United States Department of Agriculture v. United Foods, Inc. – 2001*

The Mushroom Promotion, Research, and Consumer Information Order was created in 1990 to (1) strengthen the mushroom industry's position in the marketplace, (2) maintain and expand existing markets and uses for mushrooms, and (3) develop new markets and uses for mushrooms (7 USC 6101 (b)). United Foods, Inc, a company, which produces and sells mushrooms, was against the creation of this program from its inception. When the research and promotion program was approved by producers, despite their negative endorsements, the company filed suit, stating that the order violated their First Amendment freedom of speech rights.

The case was first heard at the US District Court for the Western District of Tennessee. The district court upheld the constitutionality of the Mushroom Promotion, Research, and Consumer Information Order, citing the Supreme Court's decision in *Wileman* as the precedent. United Foods, Inc. appealed the district court's decision to the



United States Court of Appeals for the Sixth Circuit. The court of appeals reversed the district court's decision. The court stated that unlike in *Wileman*,

Mushrooms are unregulated. Hence the compelled commercial speech is not a price the members must pay under the reciprocity principle in order to further their self-interest which is regarded as arising from heavy regulation through marketing orders controlling price, supply, and quantity (*United Foods* page 225).

The United States Department of Justice, on behalf of the United States Department of Agriculture, appealed this decision to the Supreme Court.

Exactly four years after the United States Supreme Court made their ruling in *Wileman*, they made their final ruling in *United States and Department of Agriculture v. United Foods, Inc.* on June 25, 2001. The six to three ruling, with Justices Kennedy, Rehnquist, Stevens, Scalia, Souter, and Thomas in the majority and Breyer, Ginsburg, and O'Connor dissenting, affirmed the Court of Appeals' ruling and declared the generic advertising portion of the Mushroom Promotion, Research, and Consumer Information Order unconstitutional (121 S. Ct. 2334). The order violated producers' rights to the freedoms of speech and association, afforded to them under the First Amendment of the constitution. The research portion of the mandatory mushroom assessment was not affected by the ruling and continues to be collected.

In writing the opinion of the Court, Justice Kennedy attempted to make the differences between this case and *Wileman* very clear. The Court explained that the Mushroom Promotion, Research, and Consumer Information Act "violated the First Amendment, where the assessments were not ancillary to a more comprehensive program restricting market autonomy, and the advertising itself was the principal object of the

regulatory scheme” (*United Foods* page 2334). The Court stressed that it was the vast differences in these two programs that supported an opposite ruling.

California tree fruits were marketed under detailed marketing orders that had displaced competition to such an extent that they had an antitrust exemption; the Court presumed that the producers compelled to contribute funds for cooperative advertising were bound together and required by statute to market their products according to cooperative rule. Those important features are not present here. Most of the funds at issue here are used for generic advertising; and there are no marketing orders regulating mushroom production and sales, no antitrust exemption, and nothing preventing individual producers from making their own marketing decisions (*United Foods* page 3225).

The Court explained that First Amendment rights were applicable here because the producers and handlers are required to subsidize speech with which they disagree. In *Abood*, *Keller*, and *Wileman*, the objecting members were required to associate for purposes other than the compelled subsidies for speech, which was not the case in *United Foods*. Therefore, the Court made it clear that the First Amendment speech issue must be resolved within the context of the whole marketing order.

Another difference between this case and *Wileman* was whether there was agreement or disagreement with the fundamental theme of the advertising. In *United Foods*, “Respondents want to convey the message that its brand of mushrooms is superior to those grown by other producers, and it objects to being charged for a contrary message which seems to be favored by the majority of producers” (*United Foods* page 2335). However, in *Wileman*, the majority explained, “since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program” (*Wileman* page 469).

However, in the dissent, the three minority Justices brought up some interesting points. Justice Breyer, in writing the dissent, believed the mushroom program to be identical to that in *Wileman* in three respects: (1) Marketing orders do not prevent producers from communicating any message to any audience. (2) Marketing orders do not compel the handlers to engage in any actual or symbolic speech. (3) Marketing orders do not compel the handlers to endorse or finance any political or ideological views. According to Breyer, it is “difficult to understand why the presence or absence of price and output regulations could make a critical First Amendment difference” (*United Foods* page 2343).

Additionally, the dissenters believe that this regulation does pass the *Central Hudson* test. It passes the first prong, because the Government does have substantial interest and the regulation is national in scope, which was the dissenter’s argument in *Wileman*. It passes the second prong because the Department does have empirical evidence demonstrating the program’s effect. (For every one million dollars spend on mushroom advertising, mushroom sales increase by 2.1%.) And, it passes the third prong as the program seems to be narrowly tailored and is national in scope (*United Foods* page 2348).

In conclusion, the Breyer says that, “At a minimum, the holding here, when contrasted with that in *Wileman*, creates an incentive to increase the Government’s involvement in any information-based regulatory program, thereby unnecessarily increasing the degree of that program’s restrictiveness” (*United Foods* page 2348).

## **Current Litigation**

With the Supreme Court's ruling in *United Foods, Inc.*, it seems that more and more commodity check-off programs are finding themselves facing constitutionality issues. I have selected two of the major programs being challenged to discuss below, one federal program, the Beef Research and Promotion Order, and one state-level program, implemented by the Florida Department of Citrus.

### Beef Research and Promotion Order

The Beef Research and Promotion Act was passed in 1985, as a part of that year's Farm Bill. This act created the Beef Research and Promotion Order and assessments began on July 18, 1986. The Beef Research and Promotion Order carries on a "program of promotion and research to strengthen the position of beef in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products" (LMA 995). Since the program was found constitutional by the Third Circuit Court of Appeals in the 1989 *Frame* case, the program was left alone until February 22, 2001.

### *Livestock Marketing Association, et al v. United States Department of Agriculture*

The Beef Research and Promotion program was approved by a producer referendum on May 10, 1988 by 78.9% of the producers, and the program began collecting mandatory assessments. In order for the program to be terminated, 10% of the producers must request that a referendum be held.

Because of the low cattle prices in 1997 and 1998, the Livestock Marketing Association (LMA) initiated a petition drive on May 5, 1998 to collect the required signatures. The drive was completed and the signatures were turned over to the United States Department of Agriculture on November 12, 1999. The department began a process to verify the signatures submitted by LMA and to determine the status of the producers. On January 15, 2001, the USDA announced that only 83,464 of the submitted 127,927 signatures were valid petitions, making the LMA petition drive 24,419 signatures short of the required 10%.

On February 22, 2001, the LMA filed suit against the United States Department of Agriculture, claiming that the department had violated the Paperwork Reduction Act in its delay in processing the petition signatures and had violated the producers' First Amendment rights by using assessment funds to "disseminate public relations messages, including anti-referendum messages" (*LMA* page 823). The district court ruled in favor of LMA and the district court judge ordered that the USDA and the Cattlemen's Beef Promotion and Research Board were prohibited "from using check-off funds for the purposes of opposing the referendum or perpetuating the existence of the Board" (*LMA* page 830).

After the Supreme Court ruling in *United Foods*, the LMA amended their complaint and added a claim that the Beef Research and Promotion Order violated their First Amendment rights. The hearing was re-tried in the District Court for the District of South Dakota, Northern Division on June 21, 2002. The district court found the beef check-off program to be a violation of the producers' First Amendment rights, and

declared the program unconstitutional. The United States Department of Agriculture appealed this decision to the court of appeals.

On July 8, 2003, the Court of Appeals of the Eighth Circuit affirmed the district court's ruling, declaring the Beef Research and Promotion Order to be unconstitutional. In its defense, the United States Department of Agriculture claimed that "the advertising conducted pursuant to the Beef Act is 'government speech' and therefore immune from First Amendment scrutiny" (*LMA*). However, the court cited *Frame* as a precedent and ruled that, "The Cattlemen's Board seems to be an entity 'representative of one segment of the population with certain common interests.' Members of the Cattlemen's Board... are not government officials, but rather, individuals from the private sector" (*LMA* page 1005).

The court then cited *Central Hudson* and *United Foods* as their precedent in making their final decision. "We conclude that the government's interest in protecting the welfare of the beef industry by compelling all beef producers and importers to pay for generic advertising is not sufficiently substantial to justify the infringement on appellees' First Amendment free speech right" (*LMA*).

And so, the Third Circuit Court of Appeals and the Eighth Circuit Court of Appeals have made opposite rulings regarding the constitutionality of the Beef Research and Promotion Order.

#### *Charter, et al. v. United States Department of Agriculture*

In other litigation involving the Beef Research and Promotion Program, a group of producers in Montana filed suit against the United States Department of Agriculture.

These producers raise “grass-fed beef that is free of hormones, subtherapeutic antibiotics, chemical additives, extra water, and irradiation” (*Charter* page 1122). Because the producers were trying to differentiate their beef products, they claimed that the generic advertising of beef through the Beef Research and Promotion Order violates their First Amendment freedom of speech rights.

In the ruling made on November 1, 2002, the United States District Court of Montana, Billings Division, upheld the constitutionality of the Beef Research and Promotion Program. Again, the USDA argued that the beef check-off constituted government speech. In this case, the district court judge sided with the government.

The Secretary of Agriculture, by way of his staff, controls the check-off-funded speech. Therefore, the speech must be attributed to the government. In fact, any patents, copyrights, inventions, or publications developed through the use of beef check-off funds are the property of the ‘U.S. Government as represented by the [Beef] Board.’ This regulation demonstrates two important points. First, the federal government owns the projects and advertisements generated with beef check-off funds. Second, the Beef Board is a representative of the government (*Charter* page 1130).

And so, the district court ruled that the Beef Research and Promotion Order represented government speech and upheld the constitutionality of the beef check-off program.

Even so, the battle is far from over for the beef check-off program. While the program was upheld by the Court of Appeals for the Third Circuit in *Frame* in 1989 and by the Montana district court in *Charter* in 2002, the Court of Appeals for the Eighth Circuit declared the program unconstitutional in favor of IMA in 2003. With three courts making two different rulings, the litigation on this program may just be beginning. The United States Department of Agriculture requested a rehearing in the Eighth Circuit

Court of Appeals, but was denied its request on October 17, 2003. Consequently, the future of this program, and similar research and promotion programs, remains uncertain.

### Florida Department of Citrus

In addition to this and numerous other federal programs being challenged, state-level commodity check-off programs are also being disputed. The Florida Citrus Code of 1935 was established by Florida statutes, Chapter 601. The program was created “to protect and enhance the quality and reputation of Florida citrus fruit and the canned and concentrated products thereof in domestic and foreign markets” (Chapter 601, F.S.). The program allows inspection, grading, classification, research, and marketing activities. This program implements two different assessments, or taxes, on citrus fruits. The Box Tax is collected on citrus fruit grown in Florida and the Equalization Tax is “imposed not upon property but rather upon the activity of processing, reprocessing, blending, mixing, packaging, or repackaging processed orange or grapefruit products of foreign citrus juices” (*FDOC* page 5). There was no assessment collected on citrus fruit or juice imported into Florida from another state. The program is overseen by the Florida Department of Citrus (FDOC) and the Florida Citrus Commission.

A group of five large citrus fruit producers and processors filed suit against the Florida Department of Citrus. This producer/processor group claimed that the Equalization Tax of the Florida Citrus Code violated the First Amendment, the Foreign Commerce Clause, the Equal Protection Clause, and the Import-Export Clause provisions of the United States Constitution. The Box Tax withstood a constitutional challenge in 1937 (*C V. Floyd*). The case was heard in a Florida district court, and a ruling was made



on March 15, 2002. In the ruling, the court focused on the Foreign Commerce Clause violation. The FDOC claimed that the assessment was levied on activities executed in the state, thus was not actually “commerce.” However, the court ruled that these processing activities were related to commerce, and so protected under the Commerce Clause.

After determining that the Commerce Clause was indeed implicated, the court turned to the question of “whether a transaction involving foreign commerce receives less favorable treatment than the same transaction involving domestic interests” (*FDOC* page 11). In answering this question, the court determined that importers pay a tax that a domestic transaction would not be required to pay. In doing this, the Equalization Tax “discriminates” between products imported from another country and products imported from another state. As this discrimination is a violation of the General Agreement on Tariffs and Trade (GATT) and Congress approved GATT under the Foreign Commerce Clause, the court concluded that the Equalization Tax is a violation of the Constitution’s Foreign Commerce Clause.

As a result of the decision, the Florida Statute was amended so that the Equalization Tax now applies to both juices imported from another country and juices imported from another state. On June 2, 2003, the processors and the Florida Department of Citrus reached a settlement regarding the First Amendment portion of the lawsuit. “The settlement allows the state’s processors to opt out of paying two-thirds of the import tax, roughly the share the department spends on juice advertising. The department also agrees to pay the five processors \$3.5 million over the next five years” (*Ledger*).

As well as this processor suit against the Florida Department of Citrus, a large group of citrus growers in the state filed suit on September 12, 2002 claiming that the citrus program's tax on oranges and grapefruits was a First Amendment violation. On March 31, 2003, a district court judge in Florida ruled that the citrus Box Tax is "unconstitutional based on the U.S. Supreme Court's *United Foods* decision" (*Ledger*). The Florida Department of Citrus has appealed the district court's decision, however a decision has not yet been made.

In addition to this state-level program, thirteen California commodity check-off programs, as well as other programs in other states, are being challenged on constitutional issues. Because these programs are facing the same problems as their federal counterparts, it is important to understand the characteristics of these state-level programs and their economic impact.

## **Chapter 3.**

### **State-level Programs and Their Survey**

As we have seen in the Florida citrus case, state-level commodity check-off programs also appear to be in danger, yet little is known about the full impact of state-level programs. A comprehensive list of all state-level programs, including contact information for each of the programs' governing boards was created and a survey of those programs was conducted to determine the characteristics and economic impact of these state-level programs.

#### **Creation of State-Level Program List**

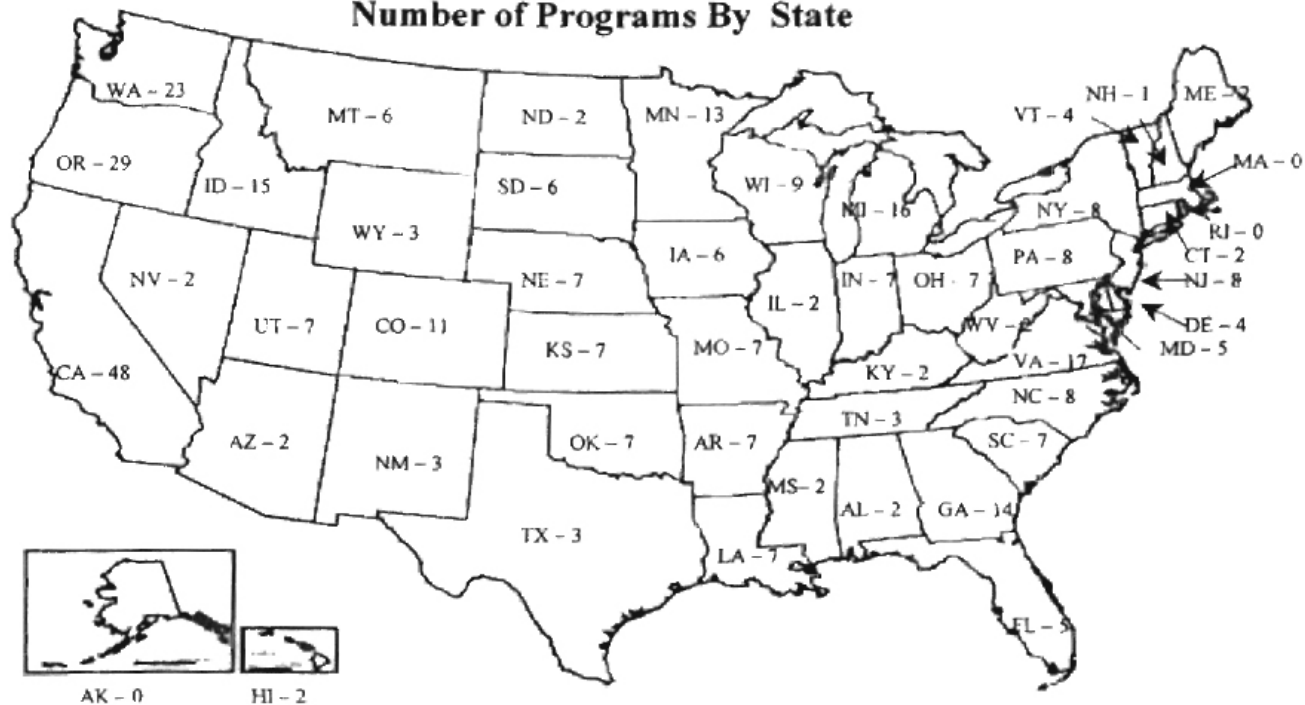
On January 14, 2003, each of the fifty state departments of agriculture received an email requesting a list of their state's commodity check-off programs, including contact information for each of their programs' governing boards. Responses from these departments were received from January 15 through June 1, with all fifty states reporting. A list of 369 state-level commodity check-off programs was compiled and can be found in Appendix A.

The list of state-level commodity check-off programs includes federal programs, which are also implemented at the state level, namely the Beef Research and Promotion Program (implemented in forty-five states) and the Pork Research, Promotion, and Consumer Information Program (implemented in forty-four states).

Figure 1 shows the number of commodity check-off programs in each state. The number of programs in each state varied from zero in Alaska, Massachusetts and Rhode

Island to forty-eight in California. The average number of programs in each state is 7.4 programs.

**Figure 1**  
**Number of Programs By State**



In Table 1, the number of programs in each commodity group is shown. The beef category consists of the 45 Qualified State Beef Councils, which were created under the federal Beef Research and Promotion Order. The livestock category includes pork, sheep, and other livestock-related programs. The grains/grass category includes corn, soybeans, wheat, rice, barley, alfalfa, and other types of grasses. The fruits category includes a wide variety of fruit commodities, such as citrus fruits, apples, cherries, grapes, and strawberries. The vegetable category includes potatoes, beans, and onions, among other things. The Other group is made up of programs that do not fit in any of the other categories, such as milk/dairy, aquaculture, poultry and honey.

**Table 1. Number of Programs by Commodity Group**

<u>Commodity Group</u>	<u>Number</u>
Beef	45
Livestock	56
Grains/Grass	75
Fruits	85
Vegetables	50
Other	78
<u>Total Programs</u>	<u>369</u>

### **Survey Methodology**

A questionnaire was sent to each of the 369 state-level commodity check-off programs. In creating this questionnaire, the Executive Directors of three in-state programs, the Oklahoma Beef Council, the Oklahoma Pork Council, and the Oklahoma Wheat Commission, agreed to pre-test the questionnaire. Each of the three Executive Directors completed the initial survey and shared their questions, comments and concerns.

Using this industry input, the final questionnaire was completed and contained five background questions, fifteen characteristic questions, one budget question, and one question regarding possible alternative courses of action (See Appendix C for the actual state survey). A cover letter, one copy of the questionnaire, which filled the front and back of one legal-sized page, and one business reply envelope were sent to each program board.

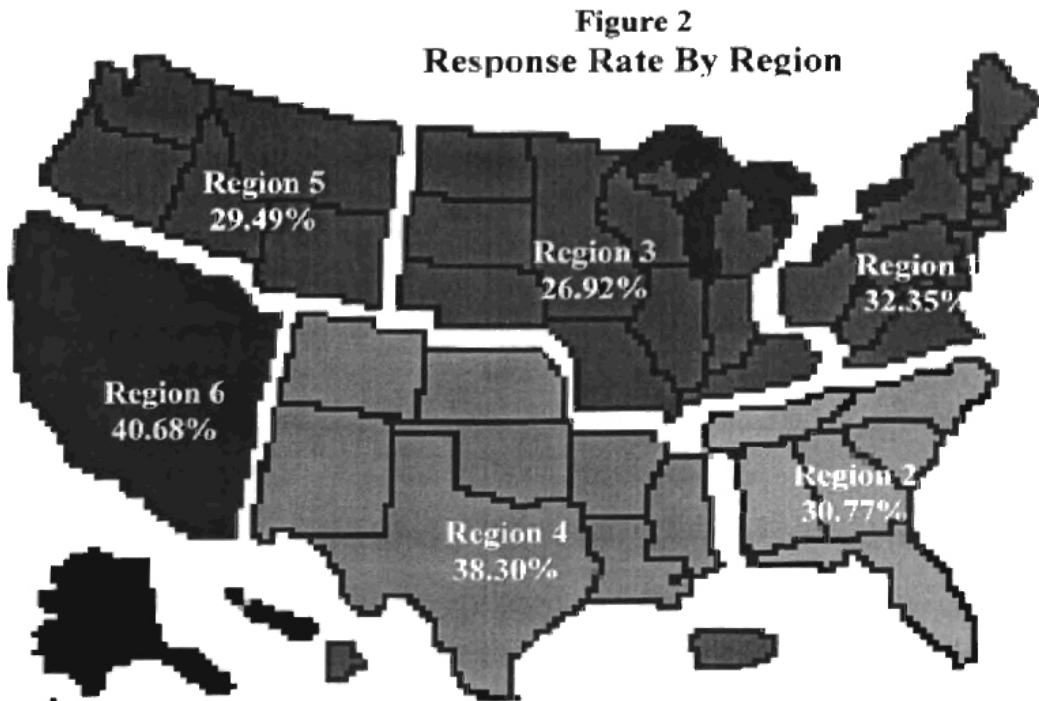
The first mailing of these questionnaires was sent to each of the 369 program boards on June 12, 2003 (See Appendix B for the first mailing cover letter). A reminder/thank-you follow-up postcard was mailed on June 26, 2003, again to every program board (See Appendix E for a copy of the postcard). A second mailing was made

thirty days after the first mailing on July 12, 2003. This mailing was sent to the 288 program boards from which no response had been received by July 10, 2003.

### Survey Response

The commodity check-off questionnaires were returned from June 19 through August 30, 2003. A total of 133 questionnaires were returned. Of these surveys, 120 were complete, usable questionnaires and 13 were incomplete questionnaires or refusals to complete the questionnaire. This came to a 36.04% response rate. This was considered an acceptable response given the current litigation that these commodity check-off programs are facing.

Individual respondent information is confidential. Figure 2 below shows the response rate by region. The southwestern region, Region 6, had the highest response rate with 40.68% and the north central region, Region 3, had the lowest response rate.



The table below shows the survey response rate by commodity group. The livestock programs had the lowest response rate, with a little more than a quarter of the programs responding. The vegetable programs had the highest response rate, with nearly half of those programs returning a questionnaire.

**Table 2. Response Rate by Commodity Group**

<b>Commodity Group</b>	<b>Response Rate</b>
Beef	28.89%
Livestock	23.21%
Grains/Grass	37.33%
Fruits	40.00%
Vegetables	46.00%
Other	21.79%

## **Survey Results**

### *Classification Characteristics*

In describing their programs, respondents indicated that there were 12 marketing orders (meaning that they implement some regulation other than research and promotional activities), 87 research and promotion programs, 13 research only programs, 2 promotion only programs, and 4 quality inspection programs.

### *Implemented Regulations*

Respondents were then asked to note which regulations are implemented, authorized but not implemented, and not authorized under their respective program. Table 3 shows the regulations authorized and implemented by the 119 respondents who answered the question.

**Table 3. Regulation Implementation**

<b>Authorized, but not Implemented</b>	<b>Not Authorized</b>	<b>Implemented</b>	<b>Regulation</b>
0	117	1	Uniform Price
0	118	0	Price Controls
2	115	1	Price Supports
0	115	3	Quality Restrictions
4	105	9	Quantity Restrictions
1	111	6	Size Restrictions
2	112	3	Standardized Packaging Requirements
1	114	3	Surplus Disposal Requirements
2	115	1	Reserve Pools
18	9	92	Market Research
10	7	102	Production Research
10	11	98	Consumer Education
18	23	77	Generic Advertising

The information in Table 3 leads to the conclusion that the four research and promotional activities are the most commonly implemented regulations in commodity check-off programs. Regulations on market research, production research, consumer education, and generic advertising are by far the most frequently implemented by these programs. Characteristics that would create an anti-trust exemption, such as price, quality, quantity, or packaging restrictions, are less common in the responding state-level commodity check-off programs.

#### *Assessment Characteristics*

Of the responding programs, 90 of the programs collect mandatory assessments and the remaining 28 programs are voluntary. Of these voluntary programs, 16 of them collect mandatory assessments, however producers can request a refund and the individuals could be reimbursed for their assessment. Of the programs reporting, 109



were funded through the commodity assessments only and 6 programs received some funds from other sources.

Assessments were collected from a variety of groups for each program. Most of the responding programs (102 programs) collected assessments on producers. In addition to producers, 15 programs collected from processors, 18 programs collected from handlers, 10 programs collected from importers, and 6 programs collected from some other group. Some programs collected assessments from more than one group.

In addition to these groups, assessments were generally collected from those products produced or processed in state, with 104 programs collecting in this way. Only 12 collected assessments from products imported from another state and 17 collected assessments from products imported from another country.

#### *Referendum Characteristics*

Questions concerning each programs' referendum, or a vote by the constituency to determine legislative approval or rejection, was also included in the questionnaire. Of the 120 responding programs, 45% were initially approved by a referendum. Of that 45%, 83% require a referendum to be held regularly to continue the program. The average length of time between these referendums is five years, with the duration ranging from annually to every ten years.

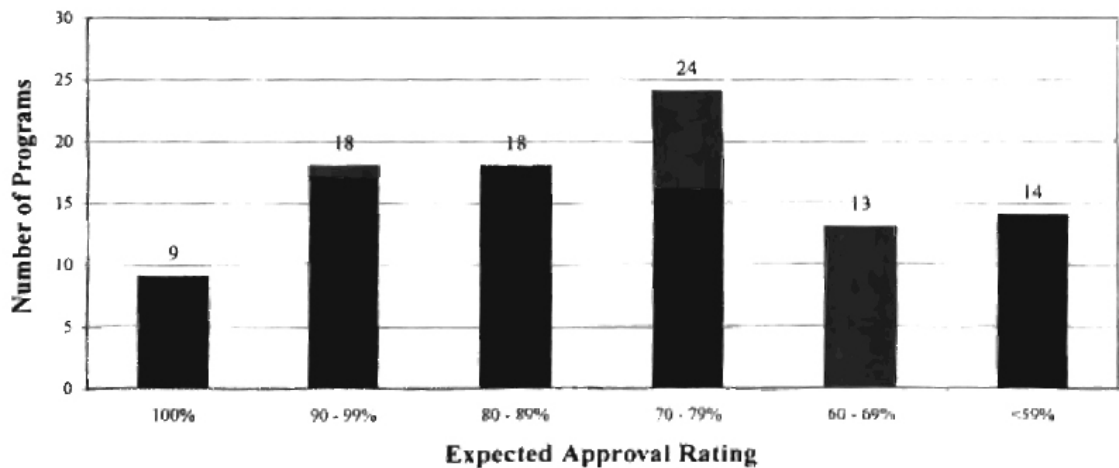
All of the respondents were asked what their current expected approval rating would be. Respondents indicated an average of a 75% anticipated approval rating. This rating ranged from 5% to 100%. The Table 4 breaks down the referendum approval rating by commodity group. The group with the highest expected approval rating is the Other commodity group. The livestock group had the lowest anticipated approval rating.

**Table 4. Anticipated Approval Rate by Commodity Group**

<b>Commodity Group</b>	<b>Approval Rate</b>
Beef	74.36%
Livestock	68.80%
Grains/Grass	71.00%
Fruits	75.80%
Vegetables	77.67%
Other	81.67%

Below, Figure 3 shows the frequency of the respondents' anticipated approval ratings. The most frequently reported anticipated approval rating was between 70 and 79%. Nine of the responding programs reported an expected approval rating of 100%.

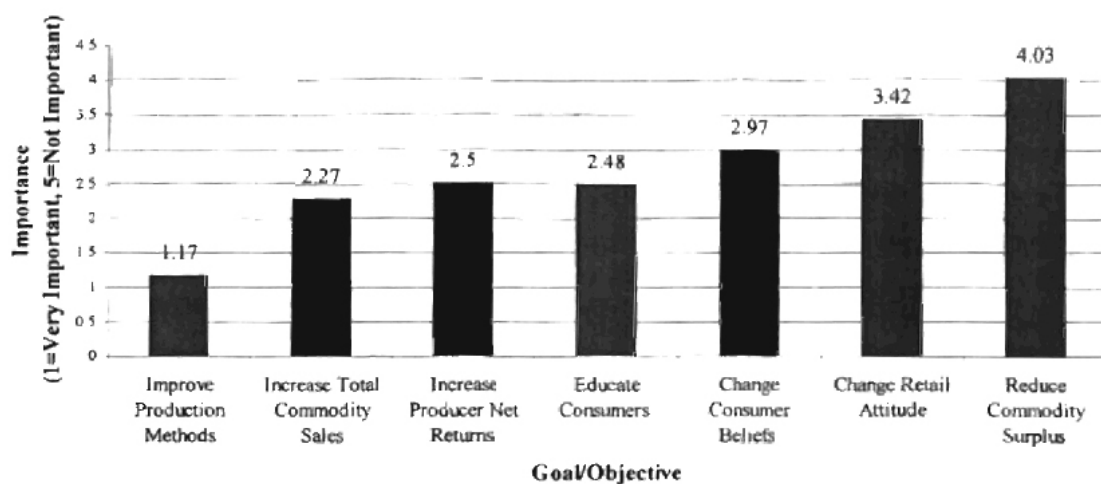
**Figure 3.  
Anticipated Approval Rating Frequency**



#### Program Goals/Objectives

Respondents also commented on the goals and objectives of their respective programs. Respondents were asked to rate the importance of their goals using a scale, with one being a very important goal or objective and five being a not very important goal or objective. The results of this question can be seen in Figure 3 below.

**Figure 4.**  
**Importance of Program Goals/Objectives**



It is interesting to note that the most important goal, to improve production methods, was not listed on the questionnaire. Approximately half of the respondents selected the 'other' goal and indicated that improving production methods was important to their program. Each of the other goals was listed on the questionnaire. Demand-based, or promotional objectives, such as Increase Total Commodity Sales and Increase Producer Net Returns are the second highest rated goals by the responding commodity groups. Educational objectives, such as Educate Consumers, Change Consumer Beliefs, and Change Retail Attitudes, were less important objectives for the commodity groups.

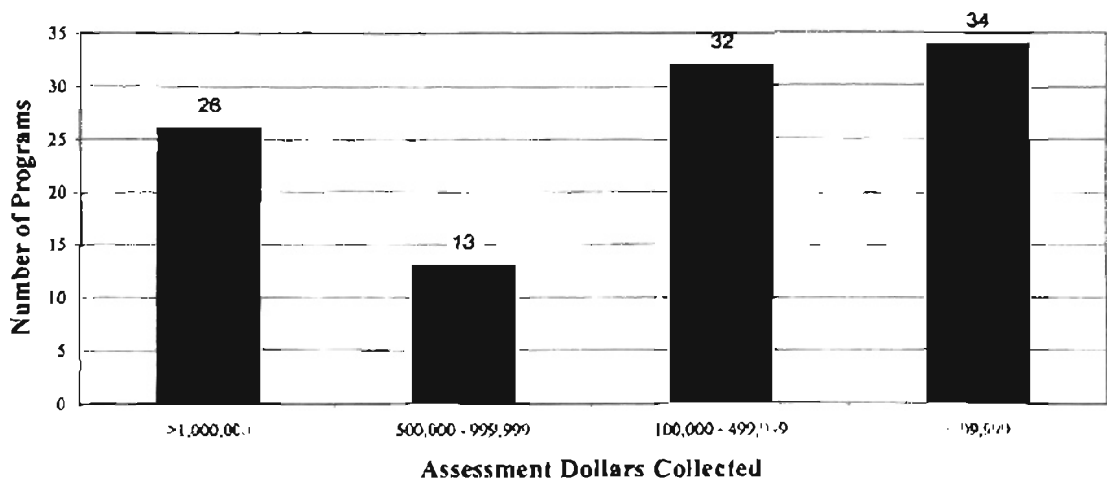
#### *Expenditure Characteristics*

Each commodity check-off program indicated the average amount of spending that their particular program used each year on the survey. A table was provided on the questionnaire with funding uses divided into thirteen categories. These activities were market research, production research, other research, consumer education, generic advertising, international marketing, other promotion, administrative fees, program

evaluation, producer communications, support for regional programs, support for national programs, and other spending. A total of \$134,651,551 is spent annually by the 105 programs, which provided expenditure information.

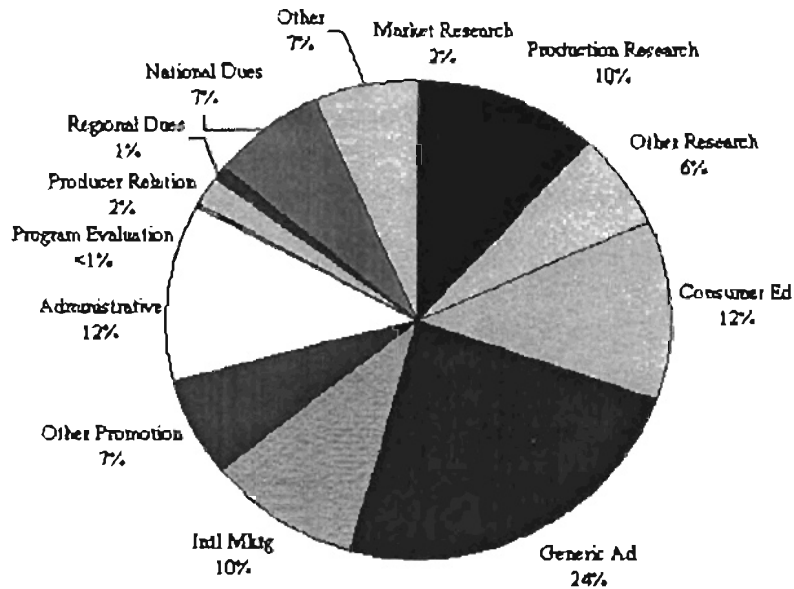
Table 4 shows the total program expenditures broken down into spending levels. The frequency diagram shows that most of the programs, 34 of them, are spending less than \$99,999 each year on average. In fact, more than half of the respondents spend less than \$500,000 each year.

**Figure 4.**  
**Total Expenditures Frequency**



The percent of total funding spent on each activity is shown in Figure 5. For example, of the total \$134,651,551 in expenditures, \$32,113,520 or 24%, was spent on generic advertising.

**Figure 6.  
Percent of Total Funding  
Spent on Activities**



It is notable that 53% of the total funds collected is being spent on promotional activities, including consumer education, generic advertising, international marketing, and other promotional activities. This expenditure usage does not match the goals/objectives that were discussed earlier, where the programs indicated that production research was their most important goal/objective. To better understand the expenditure uses for the programs, we then divided the programs into their commodity groups and again took the percent of total funding spent on each activity. Figures 7, 8, 9, 10, 11, and 12 show these results. Table 5 shows how much of the \$134,651,551 is being spent by each commodity group.

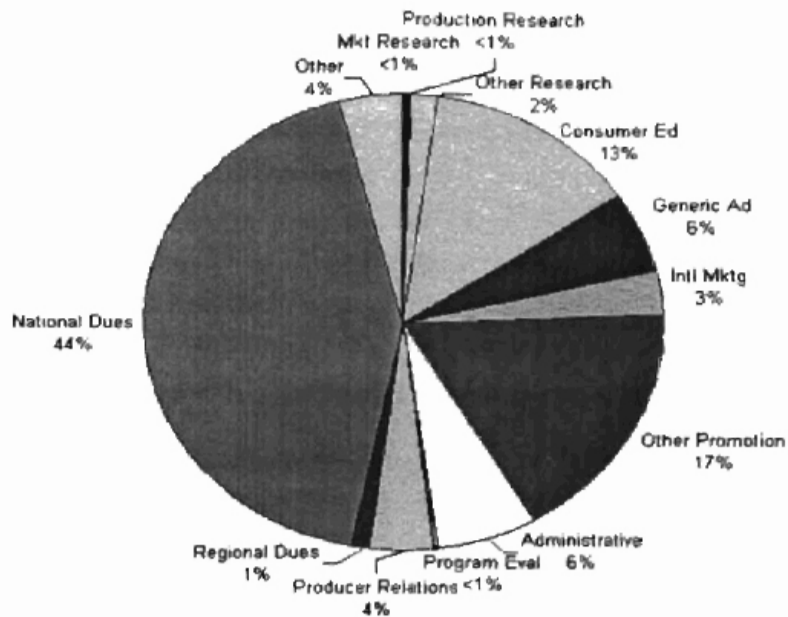
**Table 5. Spending Breakdown by Commodity Group**

<u>Commodity Group</u>	<u>Total Funding</u>
Beef	17,450,856
Livestock	1,232,792
Grain/Grass	21,606,111
Fruits	68,786,500
Vegetables	16,236,900
Other	9,338,392
<u>Total Funding</u>	<u>134,651,551</u>

The beef programs' expenditure chart is shown in Figure 7. In this chart, it is noticeable that the programs are spending nearly half of their budget on national dues. This is to be expected as the Beef Research and Promotion Order is set up such that the state programs, or Qualified State Beef Councils, collect the assessments and send half of the check-off money on to the federal Cattlemen's Beef Promotion and Research Board. It is interesting to note that 39% of their funding is spent on promotional activities. Of the remaining funding spent within the state, nearly 70% of the remaining funds are being spent promoting beef locally.

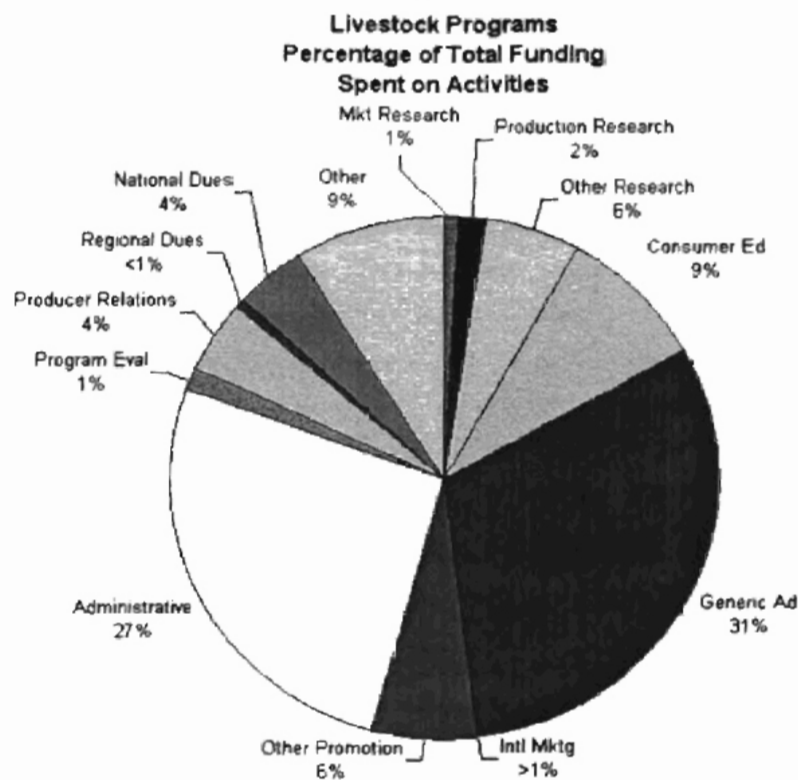
**Figure 7.**

**Beef Programs  
Percent of Total Funding  
Spent on Activities**



The thirteen responding livestock programs' expenditure chart is shown in Figure 8. Again, 46% of the expenditures are being spent on promotional activities. In this chart, it is interesting to note that 27% of the programs' budget is being spent in administrative fees.

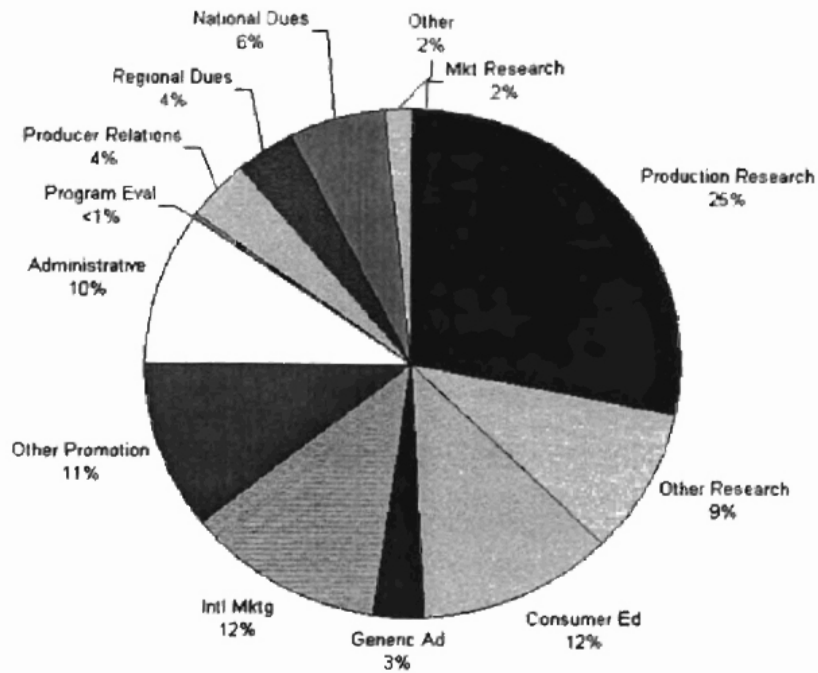
**Figure 8.**



The twenty-eight responding grass and grain programs' expenditure chart is shown in Figure 9. These programs are spending one quarter of their assessments on production research. All of the research areas comprise 36% of their budget. These programs are still spending significant amounts of funding on promotional activities, with 38% of their expenditures being spent in this area.

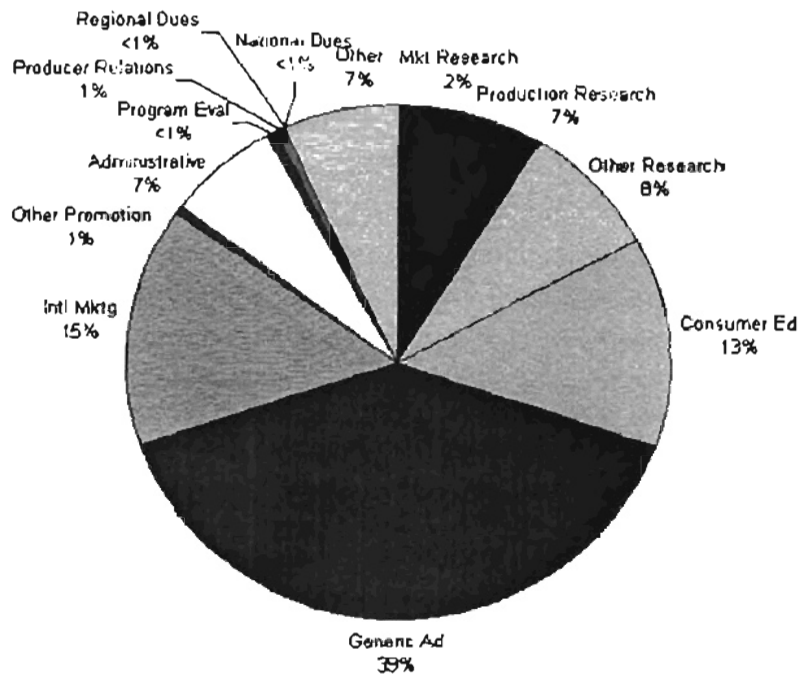


**Figure 9.**  
**Grass and Grain Programs**  
**Percentage of Total Funding**  
**Spent on Activities**



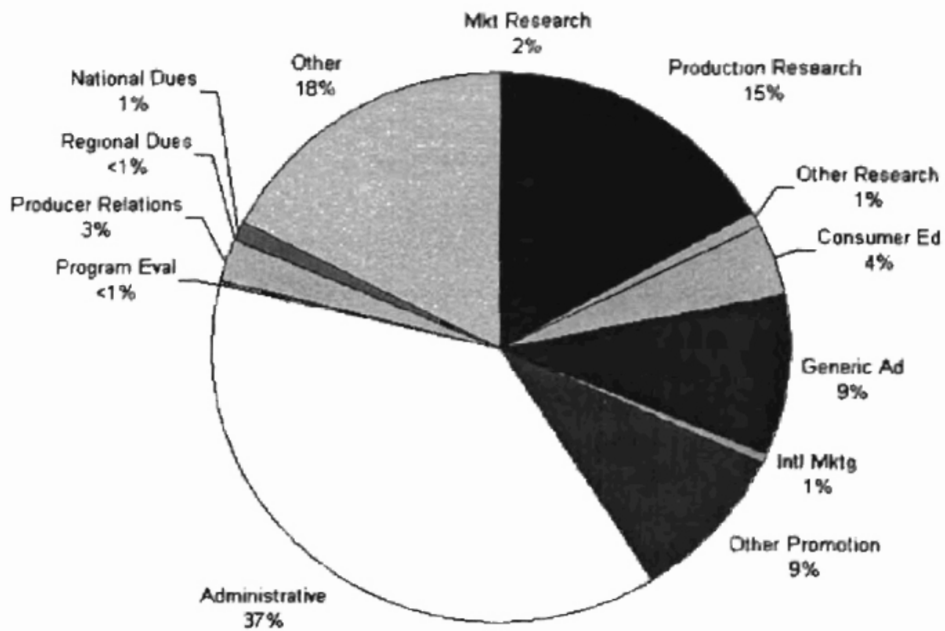
The twenty-six responding fruit programs' expenditure chart is below. These programs are spending, by far, more of their collected funds on promotional activities. More than one third of the expenditures for the fruit programs are being spent on generic advertising. These programs are spending 68% of their funding in all four of the promotional areas. Only 17% of their expenditures are being spent on research activities.

**Figure 10.**  
**Fruit Programs**  
**Percentage of Total Funding**  
**Spent on Activities**



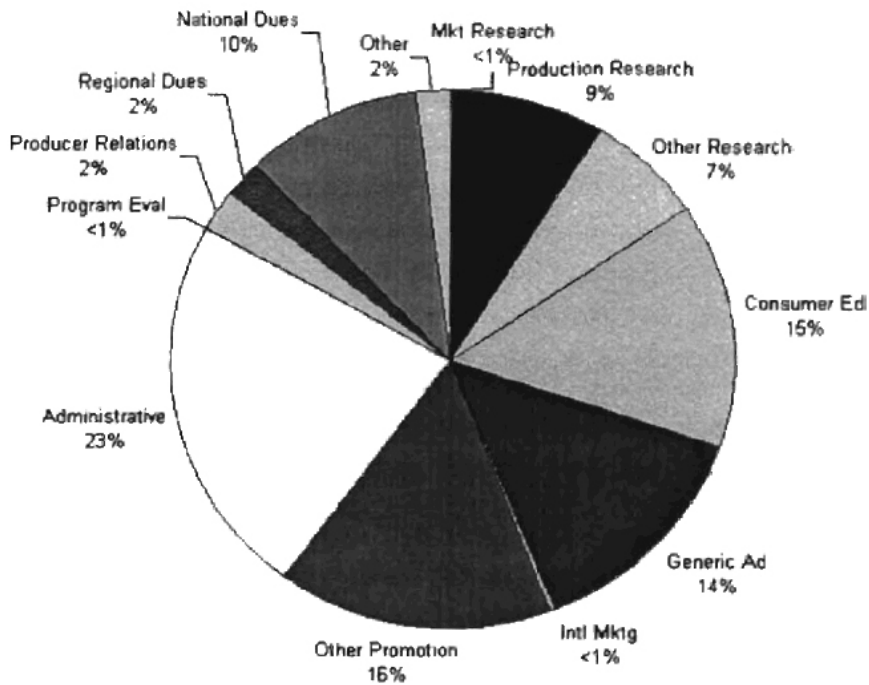
The twenty-three responding vegetable programs' expenditure chart is shown in Figure 11. The expenditure breakdown in this commodity group differs greatly from the previous four. The vegetable programs are spending a significant amount of their funding on administrative fees. More than one third, or 37% of their funds is being spent in this area. These programs are engaging in some promotional activities, using 23% of their budget in the four promotional categories.

**Figure 11.**  
**Vegetable Programs**  
**Percent of Total Funding**  
**Spent on Activities**



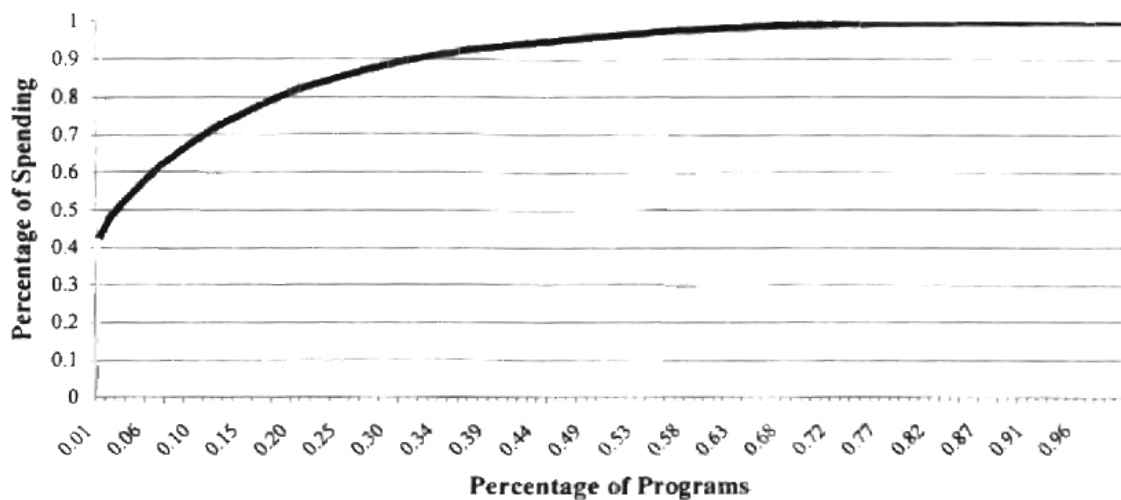
The seventeen responding other programs' expenditure chart is shown in Figure 12. This chart is similar to the previous chart as a large percentage of the budget is going toward administrative costs. However, these programs are also doing significant amounts of promotion. The four promotional activities comprise 45% of their budget.

**Figure 12.**  
**Other Programs**  
**Percentage of Total Funding**  
**Spent on Activities**



In order to better understand the differences between these charts, the expenditure concentration ratio of the commodity check-off program industry was examined. The expenditure concentration is similar to market concentration ratio, which is “the percentage of total industry sales (or physical output, or employment, or value added, or assets) contributed by the largest few firms, ranked in order of market share” (Scherer, page 50). A Lorenz curve “shows as a continuous function the percentage of total industry sales (or some other variable) accounted for by any given fraction of the total company population” (Scherer, page 51). The following diagram, Figure 13, shows the expenditure concentration in the commodity check-off industry.

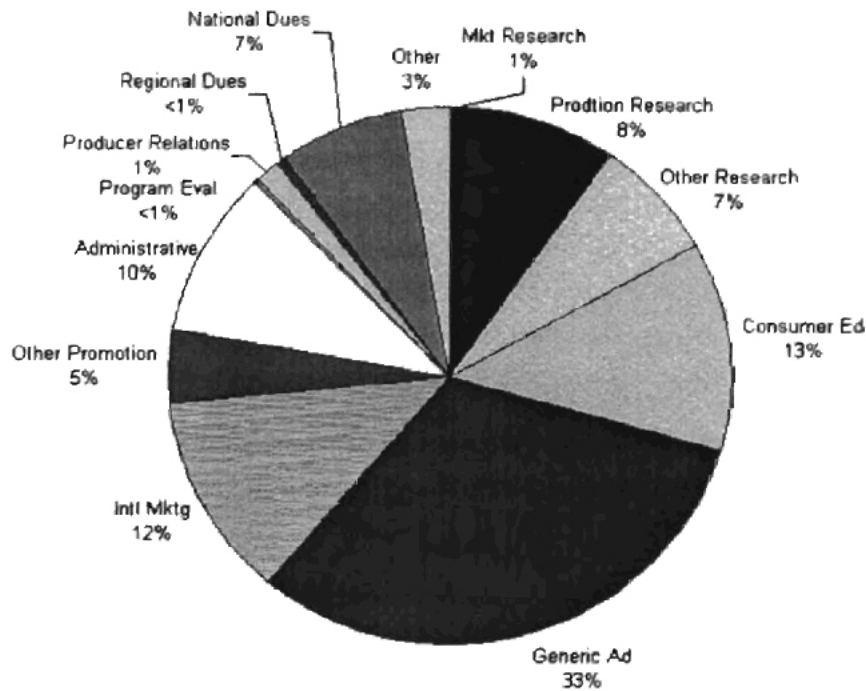
**Figure 13.**  
**Expenditure Concentration in Commodity Check-off Industry**



From Figure 13, it can be seen that the largest the largest 10% of the programs account for 69% of the total spending and the largest 50% of the programs account for 96% of the total spending. This shows that the commodity check-off industry is comprised of a few very large programs and many smaller programs.

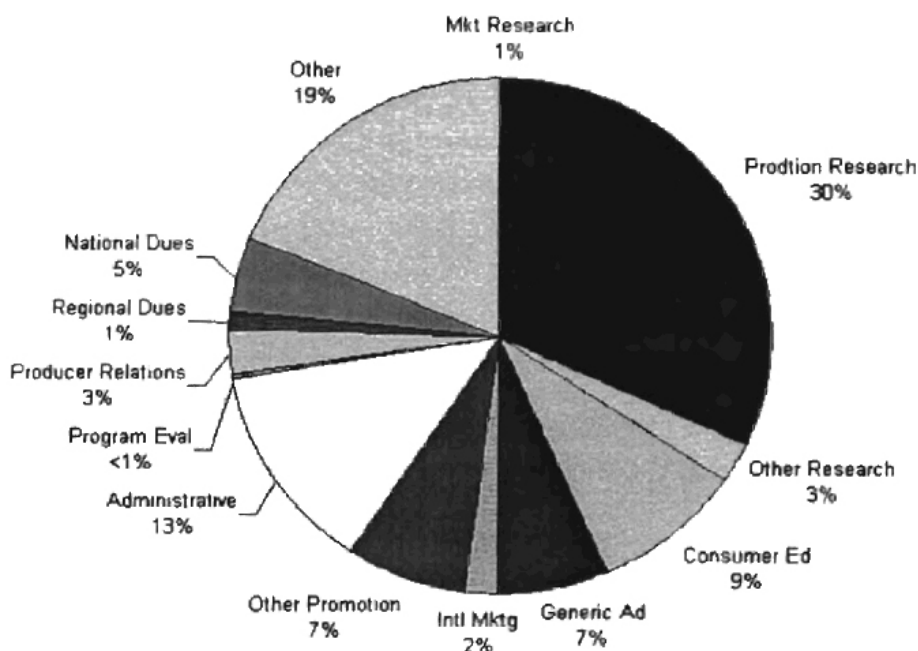
To examine the differences in spending between these two types of programs, large and small, two more pie charts were created. Figure 14 shows the spending pattern of the largest 10 programs' expenditures. In these programs, significant amounts of funding are being spent on promotional activities. These activities account for 63% of their spending. These programs are spending a smaller percentage on research activities, at only 16% of their total expenditures. The larger programs also spend a smaller percentage on administrative costs, using only 10% of their collected funds in this area.

**Figure 14.**  
**Largest 10 Programs**  
**Percentage of Total Funding**  
**Spent on Activities**



The spending pattern of the smallest 50 programs' expenditures is shown in Figure 15. This chart illustrates the estimated expenditure uses. The smaller programs are spending most of their check-off dollars on research activities. These three areas account for 34% of their funding. These programs are also promoting their commodities, however they use only one quarter of their budget on these four activities. Additionally, it is noted that the smaller programs are spending a higher percentage of their funding on administrative fees.

**Figure 15.**  
**Smallest 50 Programs**  
**Percentage of Total Funding**  
**Spent on Activities**



From this information, the rather stark differences between large and small commodity check-off program can be seen. The larger the program, the more likely they are to spend a higher percentage of their expenditures on promotional activities, specifically generic advertising. These larger programs are more likely to spend a smaller percentage on research activities and administrative costs account for a smaller percentage of their expenditures. The smaller the program, the more likely they are to spend a higher percentage of their expenditures on research activities, specifically production research. While smaller programs do participate in promotional activities, they account for a much smaller percentage of their expenditures. These smaller programs also have a tendency to use a higher percentage of their expenditures on administrative costs.

The programs seen in the litigation discussed in Chapter 2 were more similar to larger commodity check-off programs. The Beef Research and Promotion Order, California tree fruit marketing orders, and Mushroom Promotion, Research, and Consumer Information Order are rather large programs. As such, they devote a rather large percentage of their budget to promotional activities, specifically generic advertising. From the litigation history and the programs seen in that litigation, it is reasonable to conclude that it will be the larger programs, which are spending a higher percentage of their expenditures on promotional activities, which will be more likely to face constitutional challenges in the future.

### Survey Regression Analysis

Using the information obtained from the surveys, it was hypothesized that the percentage of the program's expenditures that would be spent on research activities, promotional activities, and administrative fees are related to the commodity group (Beef, Livestock, Grass/Grain, Fruit, Vegetable, and Other), the program's goals/objectives, the percentage of expenditures the program paid for regional or national program support, and the size of the program (determined by amount of expenditures).

To test the hypothesis, the following equations were estimated.

$$(1) \quad \textit{Share of Expenditures Spent on Research} = \alpha_1 + \alpha_2 \textit{ Beef} + \alpha_3 \textit{ Livestock} + \alpha_4 \textit{ Grain} + \alpha_5 \textit{ Fruit} + \alpha_6 \textit{ Vegetable} + \alpha_7 \textit{ PromotionObj} + \alpha_8 \textit{ EducationObj} + \alpha_9 \textit{ ProductionObj} + \alpha_{10} \textit{ NationalP} + \alpha_{11} \textit{ TotalSpending} + e_1$$



$$(2) \quad \text{Share of Expenditures Spent on Promotion} = \beta_1 + \beta_2 \text{ Beef} + \beta_3 \text{ Livestock} + \beta_4 \text{ Grain} + \beta_5 \text{ Fruit} + \beta_6 \text{ Vegetable} + \beta_7 \text{ PromotionObj} + \beta_8 \text{ EducationObj} + \beta_9 \text{ ProductionObj} + \beta_{10} \text{ NationalP} + \beta_{11} \text{ TotalSpending} + e_2$$

$$(3) \quad \text{Share of Expenditures Spent on Administration} = \gamma_1 + \gamma_2 \text{ Beef} + \gamma_3 \text{ Livestock} + \gamma_4 \text{ Grain} + \gamma_5 \text{ Fruit} + \gamma_6 \text{ Vegetable} + \gamma_7 \text{ PromotionObj} + \gamma_8 \text{ EducationObj} + \gamma_9 \text{ ProductionObj} + \gamma_{10} \text{ NationalP} + \gamma_{11} \text{ TotalSpending} + e_3$$

where variables are described with their means and standard deviations in Table 6 and Table 7 below.

**Table 6.** Descriptive Statistics for the Dependent Variables in the SUR Model

<b>Variable</b>	<b>Mean*</b>	<b>Standard Deviation</b>	<b>Description</b>
<i>Share of Expenditures Spent on Research</i>	0.25993	0.29300	Percent of funding spent on Market Research, Production Research, or Other Research
<i>Share of Expenditures Spent on Promotion</i>	0.36815	0.31008	Percent of funding spent on Consumer Education, Generic Advertising, International Marketing, or Other Promotion
<i>Share of Expenditures Spent on Administration</i>	0.18984	0.23077	Percent of funding spent on Administration

\*The means of the Dependent Variables do not add up to one in this case as some areas of spending (Program Evaluation, Producer Communications, and Other Spending) were not included in the Seemingly Unrelated Regression used in the analysis.

**Table 7.** Descriptive Statistics for the Independent Variables in the SUR Model

<b>Variable<sup>1</sup></b>	<b>Mean<sup>2</sup></b>	<b>Standard Deviation</b>	<b>Description</b>
<i>Beef</i>	0.10526		1 if the commodity group is Beef, zero otherwise
<i>Livestock</i>	0.10526		1 if the commodity group is Livestock, zero otherwise
<i>Grain</i>	0.22807		1 if the commodity group is Grain, zero otherwise
<i>Fruit</i>	0.20175		1 if the commodity group is Fruit, zero otherwise
<i>Vegetable</i>	0.21930		1 if the commodity group is Vegetable, zero otherwise
<i>Other</i>	0.14035		Value if all other commodity group dummy variables are zero
<i>PromotionObj</i>	0.77193		1 if Increase Total Commodity Sales, Increase Producer Net Return, or Reduce Surplus is rated 1 or 2, zero otherwise
<i>EducationObj</i>	0.62281		1 if Educate Consumers, Change Consumer Beliefs, or Change Retail Beliefs is rated 1 or 2, zero otherwise
<i>ProductionObj</i>	0.37719		1 if Improve Production Methods is rated 1 or 2, zero otherwise
<i>NationalP</i>	0.08054	0.16908	Percent of funding paid to regional or national program
<i>TotalSpending</i>	17.31813	72.19962	Total funding spent by program in \$100,000

<sup>1</sup>The commodity group dummy variables are to be compared to the omitted Other group; the objective dummy variables are to be compared to a program which did not rate any of the six provided objectives as a one or a two.

<sup>2</sup>Means of 0,1 variables are the percentage of the respondents for which the variable is 1.

The data obtained from the surveys is cross-sectional data and there was a heteroskedasticity problem. To adjust for this problem, a weighted least squares

estimator was used. The data was adjusted and the final regression parameters are shown in Tables 8, 9, and 10 below.

Below, Table 8 shows the parameter estimates and standard error for each of the independent variables in the seemingly unrelated regression model used to determine the share of expenditures spent on research activities. In this model, three of the variables were significant.

**Table 8.** Share of Expenditures Spent on Research

<b>Variable<sup>1</sup></b>	<b>Coefficient</b>	<b>Standard Error</b>
Intercept	0.185778*	0.10032
Commodity Group		
Beef	-0.11375*	0.05057
Livestock	-0.04826	0.05478
Grass/Grain	0.183632*	0.06634
Fruit	-0.06076	0.07029
Vegetable	0.03122	0.06275
Objectives		
Promotion Objectives	0.03679	0.07986
Education Objectives	-0.02451	0.69163
Production Objectives	0.05112	0.96207
Percent of Funding Sent to National	0.10092	0.10521
Size of Program	0.00003	0.00019
R <sup>2</sup>		0.5617
F-Test for Commodity Group		5.08*
F-Test for Objectives		0.24

\* Indicates significance

<sup>1</sup> The natural log of the errors squared from the SUR estimation are regressed against all of the independent variables in the original equation to adjust for heteroskedasticity. For the share of expenditures spent on research equation, the results of that regression are:

$$\ln(e_1^2) = -3.78308 - 0.47144 \text{ Beef}_1 + 0.137689 \text{ Livestock}_1 + 0.571588 \text{ Grain}_1 + 0.549365 \text{ Fruit}_1 + 0.229240 \text{ Vegetable}_1 - 0.48023 \text{ PromotionObj}_1 - 0.68488 \text{ EducationObj}_1 + 1.068911 \text{ ProductionObj}_1 + 0.842180 \text{ NationalP}_1 - 0.00117 \text{ TotalSpending}_1$$

The regression results show that beef programs are less likely than the omitted Other Group to spend assessment dollars on research activities, while the Grass/Grain

programs are more likely than the Other Group to spend a greater percentage of their expenditures on market research, production research, or other research activities. The F-tests for this equation indicate that the commodity group is a significant indicator of how much of their expenditures a program will spend on research activities; however, the program's goals/objectives are not a significant indicator of how much of their expenditures a program will spend on research activities.

Below, Table 9 shows the parameter estimates and standard error for each of the independent variables in the seemingly unrelated regression model used to determine the share of expenditures spent on promotional activities. In this model, six variables were significant.

This regression explains that the Beef programs are more likely than the omitted Other commodity group to fund promotional activities. Additionally, the Fruit and Vegetable commodity groups are likely to spend a lower percentage of their expenditures on promotional activities than the Other group. The signs on the goals/objectives indicate that programs generally spend a higher percentage of their funding on promotional activities in order to educate consumers and retailers about their commodity. All three of the objectives are insignificant in this model. The negative sign on the percentage of funding sent to national programs indicates that the more money programs send to regional or national programs, the less money they spend on promotional activities within their state. The F-tests for this equation indicate that both the commodity group and the program goals/objectives are significant indicators of how much of their expenditures a program will spend on promotional activities.

**Table 9.** Share of Expenditures Spent on Promotion

<b>Variable<sup>1</sup></b>	<b>Coefficient</b>	<b>Standard Error</b>
Intercept	0.27697*	0.07726
Commodity Group		
Beef	0.26348*	0.08763
Livestock	-0.12046	0.09229
Grass/Grain	0.08257	0.08864
Fruit	-0.16341*	0.08083
Vegetable	-0.17886*	0.07603
Objectives		
Promotion Objectives	-0.01377	0.04599
Education Objectives	0.264936*	0.04841
Production Objectives	-0.09926	0.04743
Percent of Funding Sent to National	-0.30133*	0.10319
Size of Program	0.00004	0.00029
R <sup>2</sup>		0.8986
F-Test for Commodity Group		14.00*
F-Test for Objectives		13.71*

\* Indicates significance

<sup>1</sup>The natural log of the errors squared from the SUR estimation are regressed against all of the independent variables in the original equation to adjust for heteroskedasticity. For the share of expenditures spent on promotion equation, the results of that regression are:

$$\ln(e_2^2) = -4.48443 - 1.63083 \text{ Beef}_2 - 0.00161 \text{ Livestock}_2 + 0.371293 \text{ Grain}_2 + 0.119095 \text{ Fruit}_2 - 0.88301 \text{ Vegetable}_2 + 0.886735 \text{ PromotionObj}_2 + 0.164411 \text{ EducationObj}_2 - 1.00377 \text{ ProductionObj}_2 - 0.42795 \text{ NationalP}_2 + 0.002407 \text{ TotalSpending}_2$$

Below, Table 10 shows the parameter estimates and standard error for each of the independent variables in the seemingly unrelated regression model used to determine the share of expenditures spent on administration. In this model, three variables were significant.

**Table 10.** Share of Expenditures Spent on Administrative Fees

<b>Variable<sup>1</sup></b>	<b>Coefficient</b>	<b>Standard Error</b>
Intercept	0.18097	0.33242
Commodity Group		
Beef	-0.15399	0.33267
Livestock	-0.11509	0.39227
Grass/Grain	-0.15756	0.33189
Fruit	-0.08797	0.35629
Vegetable	0.07882	0.40632
Objectives		
Promotion Objectives	0.056131*	0.02296
Education Objectives	-0.02050	0.08104
Production Objectives	0.09687	0.08314
Percent of Funding Sent to National	0.116588*	0.02186
Size of Program	0.000085*	0.00005
R <sup>2</sup>		0.8380
F-Test for Commodity Group		0.29
F-Test for Objectives		0.47

\* Indicates significance

<sup>1</sup> The natural log of the errors squared from the SUR estimation are regressed against all of the independent variables in the original equation to adjust for heteroskedasticity. For the share of expenditures spent on administration equation, the results of that regression are:

$$\ln(e_3^2) = -3.75326 - 4.76008 \text{ Beef}_3 - 0.71809 \text{ Livestock}_3 - 1.80657 \text{ Grain}_3 - 0.24107 \text{ Fruit}_3 - 0.08942 \text{ Vegetable}_3 - 0.43943 \text{ PromotionObj}_3 + 0.570199 \text{ EducationObj}_3 - 0.06071 \text{ ProductionObj}_3 + 0.267112 \text{ NationalP}_3 - 0.00316 \text{ TotalSpending}_3$$

The regression indicates that the size of the program is a significant indicator of how much funding the program will spend on administrative fees. In this case, the F-tests for this equation indicate that neither the commodity group nor the program goals/objectives are significant indicators of how much of their expenditures a program will spend on administrative activities. The regression suggests that the percent of a program's expenditures spent on administrative activities cannot be predicted using commodity groups or goals/objectives.

From the information obtained from the seemingly unrelated regression models above, we concluded that there does appear to be a relationship between the program's commodity group and the share of the program's expenditures spent on research activities. When predicting the share of a program's expenditures spent on promotional activities, both the commodity group and the program's goals and objectives affect the spending percentage. However, the share of a program's expenditures spent on administrative fees does not appear to be related to the program's commodity group, or goals/objectives, but is positively related to the program size.

## **Chapter 4.**

### **Possible Alternative Courses of Action**

Based on the reading the court rulings on commodity check-off cases and other research that has been done, five alternative courses of action have been found that would prevent a program from being found unconstitutional on the basis of a First Amendment freedom of speech violation. These actions are to (1) change the program to a marketing order, which the Supreme Court found constitutional, (2) offer a refund program to producers/handlers who advertise or promote their product individually, (3) change the promotional portion of the program to voluntary, rather than mandatory, but leave the research portion as a mandatory assessment, (4) implement designated assessments which would allow producers/handlers to choose how the Board uses their mandatory checkoff funds, or (5) change the entire program to a voluntary program. Of course, a sixth alternative would be to terminate the program entirely.

In surveying the commodity check-off executives, the respondents were asked to rank the likelihood of implementing one of these six alternatives, were their particular program found unconstitutional. The respondents were asked to rate each alternative, with one meaning that they were very unlikely to implement this alternative and seven meaning that they were very likely to implement this program. The average rating for each of the six alternatives is shown in the Table 11 below. The alternative of changing the promotional portion of the program to voluntary, while still collecting mandatory assessments for research activities was the most popular alternative course of action, while terminating the program entirely was the least popular alternative course of action



for the responding programs. To test the significant differences in these mean ratings, a t-test was conducted to determine whether the differences between the two means are significant. The test was conducted at the 95% significance level and those results are also in Table 11. The alternative of changing the promotional portion of the program to voluntary was significantly different from terminating the program entirely. Additionally, the alternative of implementing designated assessments was significantly different from terminating the program entirely.

**Table 11.** Rating of Possible Alternative Courses of Action

<b>Possible Alternative Course of Action</b>	<b>Average Rate</b>	<b>Significantly Different*</b>
Change promotions to voluntary	3.25	a
Implement designated assessments	3.21	b
Change to marketing order	3.01	
Change to voluntary program	2.97	
Offer refund	2.96	
Terminate program entirely	2.66	a, b

\*Those alternatives with the same letter are significantly different from each other at the 95% level.

Several of the responding programs, 22 programs, are already implementing one of these options. Two of the programs are actually implementing two options, as they are voluntary programs, which offer refunds. The number of programs already implementing one of these alternatives is shown in the Table 12 below.

**Table 12.** Already Implemented Alternative Courses of Action

<b>Possible Alternative Course of Action</b>	<b>Already Implemented</b>
Change to marketing order	4
Offer refund	10
Change promotion to voluntary	2
Change to voluntary program	8
Implement designated assessments	0
Terminate program entirely	0

Each of these alternatives is broken down and discussed in detail below.

### **Change the Program to a Marketing Order**

As discussed in the *Wileman* ruling, the Supreme Court has upheld commodity check-off programs when they exist in such a manner that an anti-trust exemption is formed. That is, “the business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme” (*Wileman* page 470).

In order for a commodity check-off program to be classified as a federal marketing order, it must be organized under the Agricultural Marketing Agreement Act of 1937. Additionally, in order for these marketing orders to pass First Amendment scrutiny, the program must implement regulations in a way that a “cooperative” is formed. These regulations could include price supports, price controls, uniform price, reserve pools, standardized packaging, quality restrictions, quantity restrictions, size restrictions, surplus disposal regulations, promotion, and research activities.

The problem in implementing a program such as this to combat First Amendment troubles is that many producers may not be interested in participating in a highly regulated commodity industry. Therefore, finding the producer support and approval necessary to create such a program would be difficult.

### **Offer a Refund Program to Producers/Handlers**

Some commodity check-off programs offer refunds to their producers/handlers. There are several ways to offer refunds. Programs can (1) offer a total refund on the assessments collected, (2) offer a partial refund on the assessments used for promotional activities, or (3) offer a refund or rebate only on the promotional portion of the assessments collected if the producers do individual promotional activities.

Of the 120 survey responses received, nine of the programs offer a total refund on the assessments collected. However, the average amount of funding actually returned to producers was only 5.5% of the collected funds. The refunds ranged from less than one percent to 22% of the collected funds.

The other method of offering refunds to producers is similar to that seen in the *Cal-Almond* case. The California Almond marketing order allows producers “be reimbursed in full, up to the amount of the assessment, for advertising their own products provided that the advertising met requirements set by the Board” (Crespi 23). This way, producers are not paying for promotional activities twice. According to the Supreme Court, providing a refund such as this helps to “narrowly tailor” the program such that it would pass the third prong of the *Central Hudson* test (*Wileman*).

### **Change the Promotional Portion of the Program to Voluntary**

The promotional activities of the commodity check-off programs are only part of the programs. And it is only this one part of the program that has been found unconstitutional by the United States Supreme Court. All research, administrative, and other activities have been considered constitutional. Therefore, another alternative course

of action for the commodity check-off programs is to continue to collect a mandatory assessment that funds research activities, administrative fees, and other activities and collect a voluntary, or no assessment to fund promotional activities. The Mushroom Council has adopted a similar alternative; the Council still collects assessments to fund research, but does no promotional activities. The details of this program are discussed in the case study below.

#### *Mushroom Research, Promotion, and Consumer Information Order – Case Study*

On June 25, 2001, the generic advertising and promotion portion of the Mushroom Research, Promotion, and Consumer Information Order was declared a violation of producers' First Amendment rights by the United States Supreme Court. Since that time, the program has made some changes.

The Mushroom Council, the governing board for the Mushroom Promotion, Research, and Consumer Information Order, met immediately to examine their alternatives and make a decision about the future of their program. The mushroom program was created by a group of mushroom growers, and the board wanted to continue to be a resource for these individuals. So, the Council set about finding "another way of doing service for the industry" (Minor). The board decided to continue collecting mandatory assessments, which would fund research and administrative activities, and to eliminate any promotional activities. To determine a new assessment rate, the board worked backwards. The board first determined what activities (1) the mushroom industry needed and (2) were allowed through their program and with the Supreme Court's decision. The Council then came up with an expected budget and used the anticipated

spending level to determine the final assessment rate. The board set a new assessment rate and began collecting assessments on August 1, 2001.

Since adopting these assessment changes, the Mushroom Council now collects about 60% of the funding it collected prior to the Supreme Court's ruling and subsequent program changes. The program is estimated to have the same producer support it had prior to its modifications and is still "trying to be a resource for the [mushroom] industry" (Minor).

### **Implement Designated Assessments**

Another idea on how to prevent First Amendment litigation on commodity check-off programs is to implement a "designated assessment" system. This would allow producers to determine how their assessments were being spent.

Some charitable organizations utilize this process in accepting donations. The largest and perhaps best known organization with this type of collection method is the United Nations Children's Fund, or UNICEF. When making a donation to UNICEF, the organization allows you to decide whether your contribution is used "wherever most needed, relief efforts in emergency situations where children are in need, or the Ingrid Acevedo Memorial Fund" (UNICEF). This method allows donors all over the world to contribute money, yet still have some control over how it is used.

In the commodity check-off industry, this method could be utilized in collecting assessments. Producers could indicate whether their check-off was to be used to support research activities only, promotional activities only, or wherever the assessment is most needed. Through this method, those producers who are opposed to supporting

promotional activities would not be required to do so; yet those producers who approve of the program's promotional activities could spend their assessment dollars supporting those activities.

However, there is still a concern with this alternative course of action. Some programs are concerned with the additional financial and time cost this method would put on program staffs. Additionally, the free rider problem would again be a dilemma with this option. Those producers who choose not to fund promotional activities would still receive the benefits of the promotional programs. Because of the additional overhead and possible free rider problems, this alternative would require, it may not be feasible for some of the smaller programs to implement.

### **Change the Entire Program to a Voluntary Program**

Many programs, including 24% of the programs responding to the survey, operate voluntary, rather than mandatory commodity check-off programs. These programs still participate in the same research and promotion activities in which the mandatory programs participate. However, because the programs are funded voluntarily, there is absolutely no concern of the program being declared unconstitutional. If producers or handlers disagree with the manner in which their assessment is being spent, they simply stop funding the program.

There are several areas of concern with this alternative course of action. One concern is that insufficient amounts of funding would be collected. In order to have an effective program, which participates in successful research and efficient promotion, a program must collect several hundred thousand dollars. The other main concern with this

alternative is the free-rider problem. As most agricultural products are homogenous commodities, free-rider problems exist as producers who don't pay program costs can still experience its benefits. It was for this reason that mandatory commodity check-off programs were created in the 1930's.

### **State of Oregon's Government Speech Legislation – Case Study**

In addition to these six alternatives, there is one new option being examined by some states and their legal council. If the promotional portion of these commodity check-off programs were considered government speech, then the programs would be protected, and so indisputable in reference to constitutional charges. The state of Oregon, led by their Department of Justice, has taken this approach in protecting their state-level commodity check-off programs.

Immediately following the Supreme Court's ruling in *United Foods* in June of 2001, the Oregon Department of Justice informed its commodity check-off programs of the likely litigation that would follow this Supreme Court ruling. In July of that same year, the twenty-nine commodity check-off commissions of Oregon met, approved funding and gave authorization to the Justice Department to research the current legal situation and find an alternative course of action for these programs. The commodity groups, farm organizations, and government wanted to be prepared.

In September of 2002, the Department of Justice reported its findings to the Oregon commodity check-off programs and other farm organizations. The Department recommended creating a new bill. The bill would change the organization and oversight aspects of the commissions, but the commissions would remain unchanged in their

operation and assessment collections. The commodity groups would be directly created under this new bill, thus having a direct relationship with the Oregon Department of Agriculture. The Department of Justice believed that this change in organization and oversight would allow the commodity check-off programs to classify their activities as government speech.

The new commodity check-off bill, Senate Bill 854, was approved by the Oregon State House and Senate in June of 2003. In July of 2003, the Oregon governor signed the bill into law. The new law will become effective on January 16, 2004. Even with the passage of this new bill, the Oregon commodity groups are still expecting legal battles in the near future. Thus far, there has been no litigation in the state of Oregon regarding its commodity check-off programs. However, there are a few large producers in Oregon who are vocal in their opposition to commodity check-off programs and this new legislation. The Oregon Department of Justice and some commodity groups have already been in correspondence with some attorneys threatening litigation on this new bill. The Oregon commissions are expecting a suit to be filed within the next few months. It is only after that happens that they will know if this new legislation has been successful in meeting its objective of overcoming First Amendment challenges.

John McCulley, the Administrator of the Oregon Clover Commission, the Oregon Orchardgrass Seed Producers Commission, and the Processed Vegetable Commission explained that, "If you decide to take the legislative route, it is very important to get together with all of the commodity groups and other farm organizations in your state." He believes that it is this cooperation that will help these commodity check-off programs survive.



While current commodity check-off programs may be facing an uncertain future, the litigation they are facing does not necessarily mean the end of these programs. It may mean, however, that these programs need to adapt to the current environment and change their commodity check-off programs. There are a wide variety of changes these programs can implement, short of terminating their program entirely.

The commodity check-off litigation seen over the past few years simply means that these programs need to evolve with the times, not necessarily perish entirely.

## **Chapter 5.**

### **Summary and Conclusions**

The United States Supreme Court has made two rulings in the past six years to determine the constitutionality of federal marketing orders and research and promotion programs. The first was regarding the California tree-fruit marketing order and declared that generic advertising, when part of a larger, more comprehensive marketing program, was indeed constitutional. However, later the Court ruled in the opposite direction about the Mushroom Research, Promotion, and Consumer Information Order, deciding that the generic advertising in stand-alone research and promotion programs is not constitutional. These two decisions have set off commodity check-off litigation across the United States, and research was necessary to examine the impact and characteristics of the somewhat overlooked state-level commodity check-off programs.

The objectives of this research were to determine the differences between marketing orders and research and promotion programs and how these differences can help in understanding the Supreme Court's two different rulings, to determine the characteristics of the federal and state marketing orders and research and promotion programs and include a list of all states and their respective orders and programs, and to determine most the likely alternative courses of action should specific programs or orders be declared unconstitutional in the future.

The differences between marketing orders and research and promotion programs were discussed in Chapter 1. To better understand these differences, an explanation of the formation and organization of commodity check-off programs was provided.

Commodity check-off programs were started after the Great Depression in an attempt to bring higher prices to farmers. These programs were created to put an end to free-rider problems experienced by farmers producing a homogenous product. The Agricultural Marketing Agreement Act of 1937 set the stage for most current marketing orders. Their goals tend to be to “(1) maintain the high quality of produce that is on the market, (2) standardize packages and containers, (3) regulate the flow of products to the market, (4) establish reserve pools for storable commodities, and (5) authorize production research, marketing research and development, and advertising” (USDA, AMS 1). These programs tend to require involvement such that producers create a cooperative-like relationship and an anti-trust exemption is given. Research and promotion programs came into existence later and were designed to conduct promotion, market research, production research, and new product development (USDA, AMS 2). These programs do not allow grade, quality, quantity, size, or packaging restrictions as most marketing orders and agreements do. It is these differences that would help in the understanding of the Supreme Court’s two different rulings, discussed in Chapter 2.

Chapter 2 continued to respond to the first objective of understanding the differences between the two Supreme Court commodity check-off rulings as a historical review of commodity check-off litigation was presented. This review started by examining two unrelated, yet precedent setting cases in *Abood v. Detroit Board of Education* and *Central Hudson Gas & Electric v. Public Service Commission of New York*. The government speech and three-prong commercial speech tests, which would be used in deciding future commodity check-off cases, were created in these two Supreme Court cases. From there, precedent setting commodity check-off cases were examined.

The two Supreme Court commodity check-off cases, *Glickman* and *United Foods*, were both discussed in detail. It is in understanding the differences between these two that can help determine the future of other commodity check-off programs. In its decision, the Supreme Court stressed that “the entire regulatory program must be considered in resolving the case” (*United Foods* page 2339). Then two examples of current commodity check-off litigation facing the federal Beef Research and Promotion Order and the state-level Florida Citrus Code were studied. From examining these cases, it became clear that constitutional challenges to commodity check-off programs are only beginning.

Chapter 3 focused on the second objective of determining the characteristics of the federal and state marketing orders and research and promotion programs. The chapter began with list of all 369 state-level commodity check-off programs in the United States. A survey, which was sent to these programs to determine their characteristics, was then discussed. With a 36% response rate, it was found that most of the programs focus on research and promotional activities, are funded by mandatory producer assessments, average a 75% expected approval rating, work towards improving production methods and increasing total commodity sales, and collect \$134,651,551 annually. Furthermore, through an examination of the expenditure concentration in the commodity check-off industry, it was determined that the industry is composed of a few large commodity check-off programs and several smaller programs. Based upon past litigation, it appears that only the few large programs will face litigation in the future. The smaller programs do not appear to collect enough assessment dollars to merit any litigation.

Regression analysis was conducted to determine what characteristics, if any, could predict the percentage of the expenditures a program would spend on research

activities, promotion activities, and administrative fees. Using a seemingly unrelated regression model and data adjusted for heteroskedasticity, it was found that commodity group is a significant indicator of how a program spends its assessment dollars. The remaining variables varied in significance. In research spending, the program's goals/objectives, the percent of funding sent to a regional or national program, and the size of the individual program were not significant indicators of how a program would spend its funding on research activities. In promotional spending, the education objective and the percent of funding sent to a regional or national program were both significant indicators of how a program would spend its funding on promotional activities. And in spending assessment dollars on administrative activities, the percent of funding sent to a regional or national program and the size of the program were both significant indicators of how assessments would be spent in this area.

The final objective was to determine the most likely alternative course of action for commodity check-off programs facing constitutional challenges. In Chapter 4, some of these possible alternative courses of action were examined. These alternatives are to (1) change the program to a marketing order, which the Supreme Court found constitutional, (2) offer a refund program to producers/handlers who advertise or promote their product individually, (3) change the promotional portion of the program to voluntary, rather than mandatory, but leave the research portion as a mandatory assessment, (4) implement designated assessments which would allow producers/handlers to choose how the Board uses their mandatory checkoff funds, (5) change the entire program to a voluntary program, or (6) terminate the program entirely. An explanation and analysis of each of these alternatives was provided in detail, and then yet another alternative being

implemented in the state of Oregon was also provided. That alternative is to rewrite the commodity check-off legislation, reorganizing the commissions such that the speech made by those commissions would be protected as government speech.

In examining these alternatives, it became clear that the constitutional challenges and litigation facing commodity check-off programs does not necessarily foreshadow the end of these programs. These programs still have a majority of producer support, as indicated through the 75% anticipated approval rating indicated on the commodity check-off survey. These challenges simply mean that these programs need to evolve with the time and the agricultural industry and to better meet the needs of their current producers.

Specifically, it matters whether the organizations funded with assessment dollars provide farmers with services and information that wouldn't be available if the organizations didn't exist. And it matters whether they do so in a common sense, cost-effective manner that delivers a positive return on investment to the farmer.

-Kathleen Nave, Executive Vice President,  
California Table Grape Commission

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**Appendix A**  
**Email to State Departments of Agriculture**

Dear State Department of Agriculture:

I am a graduate student at Oklahoma State University and am researching federal and state marketing orders and research and promotion programs. As part of this research, I am creating a list of all federal and state promotional programs. To ensure that I don't miss any state programs, could you please send (1) a list of all of your state's marketing orders and research and promotion programs and (2) contact information for each governing board, to me. I sincerely appreciate your help in this matter.

Sincerely,  
Megan J. Hall  
Oklahoma State University  
421C Ag Hall  
Stillwater, OK 74078  
Phone: (405) 744-9797  
Fax: (405) 744-8210

## **Appendix B**

### **List of All Federal Programs**

#### Marketing Orders:

Almond Board of California  
Washington Apricot Committee  
Florida Avocado Administrative Committee  
Florida Lime Administrative Committee  
Washington Cherry Marketing Committee  
Cherry Industry Administrative Board  
Cranberry Marketing Committee  
California Date Administrative Committee  
Citrus Administrative Committee  
Texas Valley Citrus Committee  
California Desert Grape Administrative Committee  
Hazelnut Marketing Board  
Kiwifruit Administrative Committee  
South Texas Melon Committee  
Nectarine Administrative Committee  
California Olive Committee  
Idaho-Eastern Oregon Onion Committee  
South Texas Onion Committee  
Vidalia Onion Committee – Georgia  
Walla Walla Sweet Onion Committee  
Papaya Administrative Committee  
Peach Commodity Committee  
Northwest Fresh Bartlett Pear Marketing Committee  
Winter Pear Control Committee  
Prune Marketing Committee  
Washington-Oregon Fresh Prune Marketing Committee  
Idaho-Eastern Oregon Potato Committee  
State of Washington Potato Committee  
Oregon-California Potato Committee  
Colorado Potato Administrative Committee  
Colorado Potato Administrative Committee  
Southeastern Potato Committee  
Raisin Administrative Committee  
Far West Spearmint Oil Administrative Committee  
Florida Tomato Committee  
Walnut Marketing Board of California

#### Research and Promotion Programs:

Cotton Board  
Egg Research and Promotion Order  
U.S. Highbush Blueberry Council  
California Avocado Commission  
National Honey Board  
Mushroom Council  
National Peanut Board  
Popcorn Board

National Watermelon Promotion Board  
U.S. Potato Board  
Cattlemen's Beef Promotion & Research Board  
National Pork Board  
United Soybean Board  
Mohair Council of America  
Lamb Promotion, Research, and Information Order

## **Appendix C**

### **List of All State-Level Programs**

Alabama Cattlemen's Association  
Alabama Pork Producers Association  
Arizona Beef Council  
Arizona Pork Council  
Arkansas Beef Council  
Arkansas Corn and Grain Sorghum Board  
Arkansas Catfish Promotion Board  
Arkansas Pork Producers Association  
Arkansas Rice Research and Promotion Board  
Arkansas Soybean Promotion Board  
Arkansas Wheat Promotion Board  
California Alfalfa Seed Production Research Board  
California Apple Commission  
California Artichoke Advisory Board  
California Asparagus Commission  
California Avocado Commission  
California Dry Bean Advisory Board  
California Beef Council  
California Cantaloupe Advisory Board  
California Fresh Carrot Advisory Board  
California Celery Research Advisory Board  
California Cherry Marketing Program  
California Citrus Research Board  
California Cut Flower Commission  
Dairy Council of California  
California Date Commission  
California Fig Advisory Board  
California Forest Products Commission  
California Garlic and Onion Dehydrator Advisory Board  
California Grape Rootstock Improvement Commission  
California Kiwifruit Commission  
California Lettuce Research Program  
California Melon Research Board  
California Milk Processor Advisory Board  
California Manufacturing Milk Advisory Board  
California Milk Producers Advisory Board  
California Cling Peach Growers Marketing Board  
California Pear Advisory Board  
California Pepper Commission  
California Pistachio Commission  
California Plum Marketing Program  
California Pork Producers Association  
California Potato Research Advisory Board  
California Dried Plum Board  
California Raisin Marketing Board  
California Rice Research Advisory Board  
California Rice Commission

California Salmon Council  
California Sheep Commission  
California Strawberry Commission  
California Processing Strawberry Advisory Board  
California Table Grape Commission  
California Processing Tomato Advisory Board  
California Tomato Commission  
California Walnut Commission  
California Wheat Commission  
California Wild Rice Board  
California Lake County Winegrape Commission  
California Lodi-Woodbridge Winegrape Commission  
Colorado Apple Administrative Committee  
Colorado Beef Council  
Colorado Corn Administrative Committee  
Colorado Dry Bean Administrative Committee  
Colorado Milk Marketing Board  
Colorado Livestock Association  
Colorado Potato Administrative Committee, Area II  
Colorado Potato Administrative Committee, Area III  
Colorado Sunflower Administrative Committee  
Colorado Sweet Corn Administrative Committee  
Colorado Wheat Administrative Committee  
Connecticut Apple Marketing Board  
Connecticut Pork Producers Association  
Delaware Beef Advisory Board  
Delaware Pork Producers Association  
Delaware Potato Board  
Delaware Soybean Board  
Florida Beef Council  
Florida Citrus Administrative Committee  
Florida Citrus Commission  
Florida Lime & Avocado Administrative Committee  
Florida Pork Improvement Group  
Georgia ACC for Apples  
Georgia Beef Board  
Georgia ACC for Canola  
Georgia ACC for Corn  
Georgia ACC for Cotton  
Georgia ACC for Eggs  
Georgia ACC for Milk  
Georgia ACC for Peaches  
Georgia ACC for Peanuts  
Georgia ACC for Pecans  
Georgia Pork Producers Association  
Georgia ACC for Sweet Potatoes  
Georgia ACC for Soybeans  
Georgia ACC for Tobacco  
Hawaii Beef Industry Council  
Hawaii Pork Industry Association  
Idaho Apple Commission

Idaho Cherry Commission  
Idaho Barely Commission  
Idaho Bean Commission  
Idaho Beef Council  
Idaho Dairy Products Commission  
Idaho Grape Growers and Wine Producers Commission  
Idaho Honey Advertising Commission  
Idaho Hop Commission  
Idaho Mint Commission  
Idaho Pea and Lentil Commission  
Idaho Pork Producers Association  
Idaho Potato Commission  
Idaho Sheep Commission  
Idaho Wheat Commission  
Illinois Beef Association  
Illinois Pork Producers Association  
Indiana Beef Council  
Indiana Dairy Development Board  
Indiana Corn Marketing Council  
Indiana Wine Grape Market Development Council  
Indiana Mint Market Development & Research Council  
Indiana Pork Producers Association  
Indiana Turkey Market Development Council  
Iowa Beef Industry Council  
Iowa Corn Promotion Board  
Iowa Egg Council  
Iowa Pork Producers Association  
Iowa Sheep and Wool Promotion Board  
Iowa Turkey Marketing Council  
Kansas Beef Council  
Kansas Corn Commission  
Kansas Grain Sorghum Commission  
Kansas Pork Association  
Kansas Soybean Association  
Kansas Sunflower Commission  
Kansas Wheat Commission  
Kentucky Beef Council  
Kentucky Pork Producers Association  
Louisiana Beef Industry Council  
Louisiana Catfish Promotion and Research Board  
Louisiana Crawfish Promotion and Research Board  
Louisiana Pork Producers Association  
Louisiana Rice Research & Promotion Board  
Louisiana Soybean & Grain Research & Promotion Board  
Louisiana Strawberry Marketing Board  
Maine Beef Industry Council  
Maine Hog Growers Association  
Maryland Beef Industry Council  
Maryland Horse Industry Board  
Maryland Pork Producers Association  
Maryland Seafood Marketing & Aquaculture Advisory Board



Maryland Tobacco Authority  
Michigan Apple Committee  
Michigan Asparagus Committee  
Michigan Bean Commission  
Michigan Beef Industry Commission  
Michigan Carrot Committee  
Michigan Cherry Committee  
Corn Marketing Programs of Michigan  
Michigan Cranberry Council  
Michigan Dairy Market Program  
Michigan Deer and Elk Producers Committee  
Michigan Grape and Wine Industry Council  
Michigan Onion Committee  
Michigan Plum Committee  
Michigan Pork Producers Association  
Michigan Potato Industry Commission  
Michigan Soybean Committee  
Minnesota Barley Research and Promotion Council  
Minnesota Beef Research and Promotion Council  
Minnesota Canola Research and Promotion Council  
Minnesota Corn Research and Promotion Council  
Minnesota Dairy Research and Promotion Council  
Minnesota Dry Edible Bean Research & Promotion Council  
Minnesota Pork Producers Association  
Minnesota Area I Potato Research & Promotion Council  
Minnesota Area II Potato Research & Promotion Council  
Minnesota Cultivated Wild Rice Research & Promotion Council  
Minnesota Soybean Research and Promotion Council  
Minnesota Turkey Research and Promotion Council  
Minnesota Wheat Research and Promotion Council  
Mississippi Beef Council  
Mississippi Pork Producers  
Missouri Aquaculture Council  
Missouri Beef Industry Council  
Missouri Corn Merchandising Council  
Missouri Pork Producers Association  
Missouri Sheep Merchandising Council  
Missouri Soybean Merchandising Council  
Missouri Wine Marketing and Research Council  
Montana Alfalfa Seed Committee  
Montana Beef Council  
Montana Mint Growers Association  
Montana Pork Producers Council  
Montana Seed Potato Certification Program  
Montana Wheat and Barley Committee  
Nebraska Beef Council  
Nebraska Corn Board  
Nebraska Grain Sorghum Board  
Nebraska Soybean Board  
Nebraska Pork Producers Association, Inc  
Nebraska Turkey Federation

Nebraska Egg Council  
Nevada Beef Council  
Nevada Pork Producers Association  
New Hampshire Pork Producers Council  
New Jersey Apple Industry Council  
New Jersey Beef Industry Council  
New Jersey Blueberry Industry Advisory Council  
New Jersey Dairy Industry Advisory Council  
New Jersey Poultry Products Promotion Council  
New Jersey Sweet Potato Industry Commission  
New Jersey White Potato Industry Advisory Council  
New Jersey Wine Industry Advisory Council  
New Mexico Beef Council  
New Mexico Chile Commission  
New Mexico Dry Onion Commission  
New York State Apple Marketing Order Advisory Board  
New York State Apple Research and Development Program  
New York Beef Industry Council  
New York State Sour Cherry Marketing Order Advisory Board  
Western New York Milk Marketing Dairy Promotion Order  
New York State Cabbage Research & Development Program  
New York State Onion Research & Development Program  
New York Pork Producers Cooperative, Inc  
North Carolina Apple Growers Association  
North Carolina Cattlemen's Beef Council  
North Carolina Cotton Producers Association  
North Carolina Pork Council, Inc  
North Carolina Soybean Producers Association  
North Carolina Strawberry Association  
North Carolina Sweet Potatoes  
North Carolina Tomato Growers  
North Dakota Beef Commission  
North Dakota Pork Producers Council  
Ohio Apple Marketing Program  
Ohio Beef Council  
Ohio Corn Marketing Program  
Ohio Egg Marketing Program  
Ohio Pork Producers Council  
Ohio Sheep and Wool Program  
Ohio Vegetable & Small Fruit Research & Development Committee  
Oklahoma Beef Council  
Oklahoma Egg Council  
Oklahoma Peanut Commission  
Oklahoma Pork Council  
Oklahoma Sheep and Wool Commission  
Oklahoma Wheat Commission  
Oklahoma Sorghum Commission  
Oregon Albacore Commission  
Oregon Alfalfa Seed Commission  
Oregon Bartlett Pear Commission  
Oregon Beef Council

Oregon Blueberry Commission  
Oregon Chewings & Creeping Red Fescue Commission  
Oregon Clover Commission  
Oregon Dairy Products Commission  
Oregon Dungeness Crab Commission  
Oregon Fryer Commission  
Oregon Grains Commission  
Oregon Hazelnut Commission  
Oregon Highland Bentgrass Commission  
Oregon Hop Commission  
Oregon Mint Commission  
Oregon Orchardgrass Seed Producers Commission  
Oregon Pork Producers Association  
Oregon Potato Commission  
Oregon Processed Vegetable Commission  
Oregon Raspberry and Blackberry Commission  
Oregon Ryegrass Growers Seed Commission  
Oregon Salmon Commission  
Oregon Sheep Commission  
Oregon Strawberry Commission  
Oregon Sweet Cherry Commission  
Oregon Tall Fescue Commission  
Oregon Trawl Commission  
Oregon Wheat Commission  
Western Oregon Onion Commission  
Pennsylvania Apple Board  
Pennsylvania Beef Council  
Pennsylvania Dairy Board  
Pennsylvania Peach & Nectarine Board  
Pennsylvania Potato Board  
Pennsylvania Vegetable Board  
Pennsylvania Wine Board  
Pennsylvania Pork Producers Council  
South Carolina Beef Board  
South Carolina Cotton Board  
South Carolina Tobacco Board  
South Carolina Peanut Board  
South Carolina Pork Board  
South Carolina Soybean Board  
South Carolina Watermelon Board  
South Dakota Beef Industry Council  
South Dakota Corn Utilization Council  
South Dakota Oilseeds Council  
South Dakota Pork Producers Council  
South Dakota Soybean Research and Promotion Council  
South Dakota Wheat Commission  
Tennessee Beef Industry Council  
Tennessee Pork Producers Association  
Tennessee Soybean Promotion Board  
Texas Beef Council  
Texas Pork Producers Association

Texas Oyster Marketing  
Utah Apple Board  
Utah Beef Council  
Utah Dairy Commission  
Utah Egg Marketing Board  
Utah Pork Producers Association  
Utah Sweet Cherry Board  
Utah Tart Cherry Board  
Vermont Apple Promotion Board  
Vermont Beef Council  
Vermont Dairy Promotion Board  
Vermont Maple Promotion Board  
Virginia State Apple Board  
Virginia Cattle Industry Board  
Virginia Corn Board  
Virginia Small Grains Board  
Virginia Soybean Board  
Virginia Cotton Board  
Virginia Egg Board  
Virginia Horse Board Industry  
Virginia Marine Products Board  
Virginia Irish Potato Board  
Virginia Sweet Potato Board  
Virginia Peanut Board  
Virginia Pork Industry Board  
Virginia Sheep Industry Board  
Virginia Bright Blue Flue-Cured Tobacco Board  
Virginia Dark-Fired Tobacco Board  
Virginia Winegrowers Advisory Board  
Washington Alfalfa Seed Commission  
Oregon Salmon Commission  
Washington Apple Commission  
Program  
Washington Asparagus Commission  
Washington Barley Commission  
Washington Beef Commission  
Washington Blueberry Commission  
Washington Bulb Commission  
Washington Canola Commission  
Washington Dairy Products Commission  
Washington Dry Pea and Lentil Commission  
Washington Fruit Commission  
Washington Fryer Commission  
Washington Hop Commission  
Washington Mint Commission  
Washington Pork Producers  
Washington Potato Commission  
Washington Puget Sound Salmon Commission  
Washington Seed Potato Commission  
Washington Strawberry Commission  
Washington Tree Fruit Research

Washington Turfgrass Seed Commission  
Washington Wheat Commission  
Washington Wine Commission  
West Virginia Beef Council  
West Virginia Pork Producers Council  
Wisconsin Beef Council  
Wisconsin Cherry Board, Inc  
Wisconsin Mint Board, Inc  
Wisconsin Corn Promotion Board, Inc  
Wisconsin Cranberry Board, Inc  
Wisconsin Ginseng Board of Wisconsin, Inc  
Wisconsin Soybean Marketing Board, Inc  
Wisconsin Pork Producers Association  
Wisconsin Potato Industry Board, Inc  
Wisconsin Milk Marketing Board, Inc  
Wyoming Beef Council  
Wyoming Pork Producers  
Wyoming Wheat Growers Association

## Appendix D

### First Cover Letter for Surveys

June 12, 2003

Dear Board Executive:

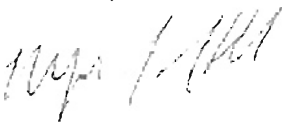
You are aware of the legal challenges to some marketing orders and promotion programs. I am a Masters graduate student doing research on marketing orders and research and promotion programs.

The United States Supreme Court has made two rulings in the past six years to determine the constitutionality of federal marketing orders and research and promotion programs. Adversaries of these programs believe that the programs are a violation of freedom of speech rights afforded under the First Amendment. The first ruling was regarding the California tree-fruit marketing order and declared that generic advertising, when part of a larger, more comprehensive marketing program, was indeed constitutional. However, later the Court ruled in the opposite direction about the Mushroom Research, Promotion, and Consumer Information Order, deciding that the generic advertising in stand-alone research and promotion programs was not constitutional.

With my research, I hope to be able to determine which promotional programs are likely to be found unconstitutional based on characteristics or components of the program and determine the most likely alternative course of action a program board could take, were their program in jeopardy of being found unconstitutional.

However, to complete my research, I need your help. I need some information from your specific program. This information will be compiled to come up with some general characteristics of both federal and state-level programs. Be assured that your response will remain *confidential*. I will summarize responses for analysis and reporting. Please fill out the enclosed survey and return it to me using the enclosed envelope. If you have any questions or concerns, please feel free to contact me by calling me at (405) 744-9797, faxing me at (405) 744-8210, or emailing me at [meganh@okstate.edu](mailto:meganh@okstate.edu). I thank you in advance for your assistance and support of my research.

Yours truly,



Megan J. Hall  
Graduate Assistant

# Appendix E

## Survey for State Marketing Order/Research and Promotion Program Boards Oklahoma State University

1. Position \_\_\_\_\_
2. Name of order/program \_\_\_\_\_
3. When was the program established (month and year)? \_\_\_\_\_
4. What geographic area does this program cover? \_\_\_\_\_
5. Under what authorizing legislation was the order established? \_\_\_\_\_
6. Which of the following descriptions is most accurate for your program?
  - a. **Marketing Order/Agreement** (mandatory/voluntary program which may allow (1) quality standards; (2) standardized packages and containers; (3) regulated flow of product to market; (4) reserve pools; or (5) production research, marketing research and development, and advertising).
  - b. **Research and Promotion Program** (program which conducts promotion, market research, production research, or new product development).
  - c. **Research program only.**
  - d. **Promotion program only.**
  - e. **Other program** (please explain the type of program if different from above) \_\_\_\_\_
7. Please indicate which of the following regulations are allowed under your program, and which of those allowed are currently being implemented by placing an X in the appropriate blank.

Not Allowed	Allowed	Implemented	
_____	_____	_____	Uniform prices
_____	_____	_____	Price controls
_____	_____	_____	Price supports
_____	_____	_____	Quantity restrictions
_____	_____	_____	Quality restrictions
_____	_____	_____	Size restrictions
_____	_____	_____	Standard packaging requirements
_____	_____	_____	Surplus disposal regulations
_____	_____	_____	Have reserve pools of product
_____	_____	_____	Market research
_____	_____	_____	Product research
_____	_____	_____	Consumer education
_____	_____	_____	Generic advertising

8. This program is a \_\_\_\_\_ producer/handler checkoff program (please select one).  
\_\_\_\_\_ Mandatory \_\_\_\_\_ Voluntary
9. Yes No This program is funded through producer/handler assessments/check-offs ONLY.
10. Yes No This program has been approved by producers/handlers through a vote or referendum.
11. Yes No This program requires a *regular* referendum to see that producers want to continue

the program. (If yes, please answer questions A – D; if no, please move to question 12.)

- a. Who is eligible to vote in a referendum (check all that apply)?  
 Producers                       Handlers  
 Other (please describe) \_\_\_\_\_
- b. How often is a producer/handler referendum held? . . . \_\_\_\_\_
- c. The date of your last referendum was (month and year) \_\_\_\_\_ . . .
- d. In your last referendum, \_\_\_\_\_ % voted to approve continuation of the program.
12. If a referendum were held today, you expect approval from \_\_\_\_\_ % of the voters.
13. The assessment rate for your program is (please use only appropriate blank)  
\_\_\_\_\_ % of the total value of the \_\_\_\_\_  
\$ \_\_\_\_\_ per \_\_\_\_\_  
\_\_\_\_\_ Other (please specify units)
14. The objectives/goals of your program are to (please rate, with 1 being *very important* and 5 being *not very important*):  
\_\_\_\_\_ Increase total commodity sales  
\_\_\_\_\_ Increase producer prices and their net returns  
\_\_\_\_\_ Reduce commodity surplus  
\_\_\_\_\_ Change consumer beliefs about our commodity  
\_\_\_\_\_ Educate consumers about our commodity and its uses  
\_\_\_\_\_ Change retail attitudes about our commodity  
\_\_\_\_\_ Other (please indicate any other objectives/goals you may have) \_\_\_\_\_
15. The evaluation methods used to evaluate this program are (please rate, with 1 being *very important* and 5 being *not very important*):  
\_\_\_\_\_ Change in consumer perceptions/attitudes  
\_\_\_\_\_ Change in sales  
\_\_\_\_\_ Change in the farm price  
\_\_\_\_\_ Other (please indicate any other evaluation methods you may use) \_\_\_\_\_
16. This program evaluates using \_\_\_\_\_ sources (check all that apply).  
 Internal                       External
17. This program collects assessments from (check all that apply):  
\_\_\_\_\_ Producers                      \_\_\_\_\_ Handlers  
\_\_\_\_\_ Processors                      \_\_\_\_\_ Importers  
\_\_\_\_\_ Other (please indicate other groups that are assessed) \_\_\_\_\_
18. This program collects assessments from commodities (check all that apply):  
\_\_\_\_\_ Produced or processed in state (or area covered by order)  
\_\_\_\_\_ Imported from another state (or area not covered by order)  
\_\_\_\_\_ Imported from another country
19. Yes    No    This program provides a refund to producers/handlers who advertise or promote their branded product individually.



a. If yes to above, \_\_\_\_\_ % is the maximum percent of checkoff that producers/handlers may receive to advertise or promote their own brand.

20. If the program is voluntary, and producers/handlers may request a refund of their contribution, \_\_\_\_\_ % of the money collected in 2002 was refunded to producers/handlers.

21. Please use the table below to indicate the total amount of funding (from producers/handler) your receives, on average, each year. You may indicate in real dollars or percentages. Please feel free to attach a copy of your most recent budget. Also, please estimate the use of this funding. If any of your funds were used for "Support for Regional Boards," "Support for National Boards," or "Other Spending," please indicate the specific uses of the funds.

Use of Funds	
Use:	Long Term Average of Spending
Research	
Market Research	
Production Research	
Other Research	
Promotion	
Consumer Education	
Generic Advertising	
International Marketing	
Other Promotion	
Administrative Fees	
Program Evaluation	
Producer Communication/Relations	
Support for Regional Boards	
Support for National Boards	
Other Spending	
<b>Total Funds Used</b>	

22. Listed below are some possible alternative courses of action if a program were to be found unconstitutional. If your order/program were to be found unconstitutional, please indicate your most likely course of action, where 7 means very *likely* to implement this action and 1 means very *unlikely* to implement this action. If you have already implemented any of these choices, please place an **X** by that selection.

Unlikely	Uncertain	Likely					
1	2	3	4				
1	2	3	4	5	6	7	Change the program to a marketing order, which the U.S. Supreme Court has found constitutional.
1	2	3	4	5	6	7	Offer a refund program to producers/handlers who advertise/promote their product individually.
1	2	3	4	5	6	7	Change the promotional portion of the program to voluntary, rather than mandatory, but leave the research portion of the program as a mandatory assessment.
1	2	3	4	5	6	7	Change the entire program to a voluntary program.
1	2	3	4	5	6	7	Implement designated assessments which would allow producers/handlers to choose how the Board uses their mandatory checkoff funds. Producers who do not wish to support advertising would be allowed to designate their assessment for research only.
1	2	3	4	5	6	7	Terminate the program entirely.

We are attempting to create a list of marketing orders and research and promotion programs created and supported at the state level. Do you know of any state-level programs in your commodity area? If so, please list them.

## Appendix F

### Survey for Federal Marketing Order/Research and Promotion Program Boards Oklahoma State University

22. Position \_\_\_\_\_
23. Name of order/program \_\_\_\_\_
24. When was the program established (month and year)? \_\_\_\_\_
25. What geographic area does this program cover? \_\_\_\_\_
26. Under what authorizing legislation was the order established? \_\_\_\_\_
27. Which of the following descriptions is most accurate for your program?
- Marketing Order/Agreement** (mandatory/voluntary program which may allow (1) quality standards; (2) standardized packages and containers; (3) regulated flow of product to market; (4) reserve pools; or (5) production research, marketing research and development, and advertising).
  - Research and Promotion Program** (program which conducts promotion, market research, production research, or new product development).
  - Research program only.**
  - Promotion program only.**
  - Other program** (please explain the type of program if different from above) \_\_\_\_\_

28. Please indicate which of the following regulations are allowed under your program, and which of those allowed are currently being implemented by placing an X in the appropriate blank.

Not Allowed	Allowed	Implemented	
_____	_____	_____	Uniform prices
_____	_____	_____	Price controls
_____	_____	_____	Price supports
_____	_____	_____	Quantity restrictions
_____	_____	_____	Quality restrictions
_____	_____	_____	Size restrictions
_____	_____	_____	Standard packaging requirements
_____	_____	_____	Surplus disposal regulations
_____	_____	_____	Have reserve pools of product
_____	_____	_____	Market research
_____	_____	_____	Product research
_____	_____	_____	Consumer education
_____	_____	_____	Generic advertising

29. This program is a \_\_\_\_\_ producer/handler checkoff program (please select one).  
                                   \_\_\_\_\_ Mandatory                                   \_\_\_\_\_ Voluntary

30. Yes    No    This program has been approved by producers/handlers through a vote or referendum.

31. Yes    No    This program requires a regular referendum to see that producers want to continue the program. (If yes, please answer questions A – D; if no, please move to question 12.)

- a. Who is eligible to vote in a referendum (check all that apply)?  
 Producers  Handlers  
 Other (please describe) \_\_\_\_\_
- b. How often is a producer/handler referendum held? \_\_\_\_\_
- c. The date of your last referendum was (month and year) \_\_\_\_\_
- d. In your last referendum, \_\_\_\_\_ % voted to approve continuation of the program.

32. If a referendum were held today, you expect approval from \_\_\_\_\_ % of the voters.

33. The assessment rate for your program is (please use only appropriate blank)  
 \_\_\_\_\_ % of the total value of the \_\_\_\_\_  
 \$ \_\_\_\_\_ per \_\_\_\_\_  
 \_\_\_\_\_ Other (please specify units)

34. The objectives/goals of your program are to (please rate, with 1 being *very important* and 5 being *not very important*):

- \_\_\_\_\_ Increase total commodity sales  
 \_\_\_\_\_ Increase producer prices and their net returns  
 \_\_\_\_\_ Reduce commodity surplus  
 \_\_\_\_\_ Change consumer beliefs about our commodity  
 \_\_\_\_\_ Educate consumers about our commodity and its uses  
 \_\_\_\_\_ Change retail attitudes about our commodity  
 \_\_\_\_\_ Other (please indicate any other objectives/goals you may have) \_\_\_\_\_

35. The evaluation methods used to evaluate this program are (please rate, with 1 being *very important* and 5 being *not very important*):

- \_\_\_\_\_ Change in consumer perceptions/attitudes  
 \_\_\_\_\_ Change in sales  
 \_\_\_\_\_ Change in the farm price  
 \_\_\_\_\_ Other (please indicate any other evaluation methods you may use) \_\_\_\_\_

36. This program evaluates using \_\_\_\_\_ sources (check all that apply).

- \_\_\_\_\_ Internal \_\_\_\_\_ External

37. This program collects assessments from (check all that apply):

- \_\_\_\_\_ Producers  Handlers  
 \_\_\_\_\_ Processors  Importers  
 \_\_\_\_\_ Other (please indicate other groups that are assessed) \_\_\_\_\_

38. This program collects assessments from commodities (check all that apply):

- \_\_\_\_\_ Produced or processed in state (or area covered by order)  
 \_\_\_\_\_ Imported from another country

18. Yes  No  This program provides a refund to producers/handlers.

- a. If yes to above, \_\_\_\_\_ % is the maximum percent of checkoff that producers/handlers may receive to advertise or promote their own brand.

19. If the program is voluntary, and producers/handlers may request a refund of their contribution, \_\_\_\_\_ % of the money collected in 2002 was refunded to producers/handlers.
20. Please use the table below to indicate the total amount of funding (from producers/handler) your receives, on average, each year. You may indicate in real dollars or percentages. Please feel free to attach a copy of your most recent budget. Also, please estimate the use of this funding. If any of your funds were used for "Support for State Boards," "Support for Regional Boards," or "Other Spending," please indicate the specific uses of the funds.

Use of Funds	
Use:	Long Term Average of Spending
Research	
Market Research	
Production Research	
Other Research	
Promotion	
Consumer Education	
Generic Advertising	
International Marketing	
Other Promotion	
Administrative Fees	
Program Evaluation	
Producer Communication/Relations	
Support for State Boards	
Support for Regional Boards	
Other Spending	
<b>Total Funds Used</b>	

23. Listed below are some possible alternative courses of action if a program were to be found unconstitutional. If your order/program were to be found unconstitutional, please indicate your most likely course of action, where 7 means very *likely* to implement this action and 1 means very *unlikely* to implement this action. If you have already implemented any of these changes, please place an X next to that choice.

Unlikely		Uncertain			Likely		
1	2	3	4	5	6	7	
							Change the program to a marketing order, which the U.S. Supreme Court has found constitutional.
							Offer a refund program to producers/handlers who advertise/promote their product individually.
							Change the promotional portion of the program to voluntary, rather than mandatory, but leave the research portion of the program as a mandatory assessment.
							Change the entire program to a voluntary program.
							Implement designated assessments which would allow producers/handlers to choose how the Board uses their mandatory checkoff funds. Producers who do not wish to support advertising would be allowed to designate their assessment for research only.
							Terminate the program entirely.

We are attempting to create a list of marketing orders and research and promotion programs created and supported at the state level. Do you know of any state-level programs in your commodity area? If so, please list them.

## **Appendix G**

### **Reminder/Thank You Postcard for Surveys**

You should have received a survey from me a few weeks ago. The survey you received is part of my research on marketing orders and research and promotion programs. With this research, I hope to be able to determine which promotional programs are likely to be found unconstitutional based on characteristics or components of the program and determine the most likely alternative course of action a program board could take, were their program in jeopardy of being found unconstitutional.

If you have already returned your survey to, I would like to sincerely thank you for your time and your support of my thesis. If you have not, I would like to remind you of the importance of this research and hope that you will take a few minutes to complete the survey and return it to me. Again, thank you all for your assistance.

Megan Hall  
Oklahoma State University  
Department of Agricultural Economics

## Appendix H

### Second Cover Letter for Surveys

July 12, 2003

Dear Board Executive:


You should have received a survey from me a few weeks ago. However, I have not received your completed survey. Let me remind you of the purpose of this survey.

The United States Supreme Court has made two rulings in the past six years to determine the constitutionality of federal marketing orders and research and promotion programs. Adversaries of these programs believe that the programs are a violation of freedom of speech rights afforded under the First Amendment. The first ruling was regarding the California tree-fruit marketing order and declared that generic advertising, when part of a larger, more comprehensive marketing program, was indeed constitutional. However, later the Court ruled in the opposite direction about the Mushroom Research, Promotion, and Consumer Information Order, deciding that the generic advertising in stand-alone research and promotion programs was not constitutional.

With my research, I hope to be able to determine which promotional programs are likely to be found unconstitutional based on characteristics or components of the program and determine the most likely alternative course of action a program board could take, were their program in jeopardy of being found unconstitutional.

However, to complete my research, I need your help. I need some information from your specific program. This information will be compiled to come up with some general characteristics of both federal and state-level programs. Be assured that your response will remain *confidential*. I will summarize responses for analysis and reporting. Please fill out the enclosed survey and return it to using the enclosed envelope. If you have any questions or concerns, please feel free to contact me by calling me at (405) 744-9797, faxing me at (405) 744-8210, or emailing me at [meganh@okstate.edu](mailto:meganh@okstate.edu). I thank you in advance for your assistance and support of my research.

Yours truly,



Megan J. Hall  
Graduate Assistant



## Appendix I

### Oklahoma State University Institutional Review Board

Protocol Expires: 4/29/2004

Date: Wednesday, April 30, 2003

IRB Application No AG0324

Proposal Title: CONSTITUTIONALITY OF MANDATORY COMMODITY PROMOTION CHECK-OFFS

Principal  
Investigator(s):

Megan Hall

Dan Tilley

422 AG

Stillwater, OK 74078

Stillwater, OK 74078

Reviewed and  
Processed as: Exempt

Approval Status Recommended by Reviewer(s): Approved

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Dear PI,

Your IRB application referenced above has been approved for one calendar year. Please make note of the expiration date indicated above. It is the judgment of the reviewers that the rights and welfare of individuals who may be asked to participate in this study will be respected, and that the research will be conducted in a manner consistent with the IRB requirements as outlined in section 45 CFR 46.

As Principal Investigator, it is your responsibility to do the following:

1. Conduct this study exactly as it has been approved. Any modifications to the research protocol must be submitted with the appropriate signatures for IRB approval.
2. Submit a request for continuation if the study extends beyond the approval period of one calendar year. This continuation must receive IRB review and approval before the research can continue.
3. Report any adverse events to the IRB Chair promptly. Adverse events are those which are unanticipated and impact the subjects during the course of this research; and
4. Notify the IRB office in writing when your research project is complete.

Please note that approved projects are subject to monitoring by the IRB. If you have questions about the IRB procedures or need any assistance from the Board, please contact Sharon Bacher, the Executive Secretary to the IRB, in 415 Whitehurst (phone: 405-744-5700, sbacher@okstate.edu).

Sincerely,



Carol Olson, Chair  
Institutional Review Board

# VITA



Megan Joy Hall

Candidate for the Degree of

Master of Science

Thesis: CHARACTERISTICS OF COMMODITY CHECK-OFF PROGRAMS

Major Field: Agricultural Economics

Biographical:

Personal Data: Born in Morehead, Kentucky on November 22, 1979, the daughter of Keith and Charlotte Hall.

Education: Graduated from Western Boone Junior/Senior High School, Thorntown, Indiana in May 1998; received Bachelor of Science degree in Agribusiness, Marketing minor from Oklahoma State University, Stillwater, Oklahoma in May 2002. Completed the requirements for the Master of Science degree with a major in Agricultural Economics at Oklahoma State University, Stillwater, Oklahoma in December 2003.

Experience: Raised on a farm with horses near Lebanon, Indiana; volunteered for Oklahoma State University, Department of Animal Science as Assistant Coach, Horse Judging Team, 2000 to present; employed by Oklahoma State University, Department of Residential Life as a Community Facilitator/Resident Assistant, 2001 to 2003; employed by Oklahoma State University, Department of Agricultural Economics as a graduate research assistant, 2002 to present.

Professional Memberships: American Agricultural Economics Association.