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Get Real: Organic Marketing Under USDA's Proposed Promotion & Research Agreement

RITA-MARIE CAIN REID*

ABSTRACT

In May 2016, the Organic Trade Association (OTA) petitioned the United States Department of Agriculture (USDA) to establish a federal research and promotion program for organic products. This paper discusses the statutory basis for agricultural marketing under USDA. The paper explains some of the legal issues inherent in organic marketing, including free speech concerns. The paper analyzes specifics of the proposed organic marketing program. The paper concludes with recommendations and future research opportunities.

INTRODUCTION

In May 2016, the Organic Trade Association (OTA) petitioned the United States Department of Agriculture (USDA) to establish a federal research and promotion program for organic products.¹ On January 18, 2017, USDA's Agricultural Marketing Service (AMS) proposed "the establishment of an industry-funded promotion,

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¹ ORGANIC TRADE ASS'N, LETTER TO ELANOR STARMER (May 3, 2016), <https://www.ams.usda.gov/sites/default/files/media/Revised%20Organic%20OTA%20Proposal%20Bundle%2005%2002%2016.pdf>.

The Organic Trade Association (OTA) is the membership-based business association for organic agriculture and products in North America. OTA is the leading voice for the organic trade in the United States, representing over 8,500 organic businesses across 50 states. Its members include growers, shippers, processors, certifiers, farmers' associations, distributors, importers, exporters, consultants, retailers and others. Organic products represented include organic foods, ingredients and beverages, as well as organic fibers, personal care products, pet foods, nutritional supplements, household cleaners and flowers.

About OTA, ORGANIC TRADE ASS'N, <https://www.ota.com/about-ota> [<https://perma.cc/Y688-Q2UX>] (last visited Mar. 8, 2017). The OTA calls its proposed organic marketing agreement the "Generic Research and Promotion Order for Organic" or "GRO Organic." *FAQ*, GROORGANIC, <http://groorganic.net/faq/> [<http://perma.cc/H65L-6P8E>] (last visited Jan. 25, 2017). OTA's "GRO Organic Core Committee" is a subset of its Organic Research and Promotion Program Steering Committee. The GRO Organic Core Committee includes OTA subcommittee chairs and other industry leaders who developed OTA's proposal. *See Organic Research, Promotion, and Information Order*, 82 Fed. Reg. 5746 (Jan. 18, 2017).

research, and information program for certified organic products.”² USDA’s proposed rule is based extensively on the OTA GRO Organic proposal.³

AMS-facilitated research and promotion programs establish a framework for participants to conduct research and promotion using pooled resources.⁴ A few of these programs have sponsored well-known national advertising campaigns, such as “Beef. It’s What’s for Dinner,”⁵ “Pork. The Other White Meat,”⁶ and “The Incredible Edible Egg.”⁷ Typically, these programs (also known as checkoff programs) assess a small fee per product moved into the food chain. These fees go toward research and consumer communications (including the national ad campaigns just mentioned). These programs are administered by industry board members who interact with the AMS, all under the Secretary of Agriculture.⁸

Part I of this paper first discusses the legislative history of agricultural marketing under USDA that underpins the proposed organic checkoff program. This section also explains some of the legal issues inherent in organic marketing that will be relevant to any national organic promotion program, including free speech concerns. Part II of the paper then critiques specifics of the proposed organic checkoff program. Part III concludes with recommendations and future research.

I. AGRICULTURAL PROMOTION UNDER USDA

A number of federal laws and cases underlie the proposed organic program. This section explains the legislative history of USDA marketing, relevant free speech cases, and recent organic-specific enactments.

A. Statutory Background for Agricultural Marketing

In addition to research and promotion programs, such as those well-known ones mentioned above, government-controlled agricultural marketing is also done under market orders and marketing agreements. The Agricultural Marketing Agreement Act

² Organic Research, Promotion, and Information Order, 82 C.F.R. 5746 (2017), <https://www.gpo.gov/fdsys/pkg/FR-2017-01-18/pdf/2017-00601.pdf>. The Notice of Proposed Rulemaking (Notice) subsequently revised the public comment period from March 17, 2017 to April 19, 2017. Organic Research, Promotion and Information Order: Certified Products, 82 Fed. Reg. 11854 (2017). While the original Notice was proposed during the final days of President Obama’s administration, the revised Notice was under the current regime. Nothing from President Trump or others in his administration suggests any change in attitude or approach to this policy.

³ *Id.* at 5749.

⁴ *Research & Promotion, Agricultural Marketing Service*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/rules-regulations/research-promotion> [<https://perma.cc/8C3X-DQLA>] (last visited Oct. 24, 2017).

⁵ CATTLEMEN’S BEEF BOARD & NAT’L CATTLEMEN’S BEEF ASS’N, *Beef. It’s What’s for Dinner*, http://www.beefitswhatsfordinner.com/CMDocs/BIWFD/FactSheets/New_Advertising_Campaign.pdf [<https://perma.cc/GY3Q-NZV9>] (last visited Mar. 8, 2017).

⁶ *Pork. The Other White Meat*, NAT’L PORK PRODUCERS COUNCIL, <http://nppc.org/issues/issue/pork-the-other-white-meat/> [<https://perma.cc/G5CE-HFBJ>] (last visited Mar. 8, 2017).

⁷ *Incredible*, AM. EGG BOARD, <http://www.aeb.org/about-aeb/about> [<https://perma.cc/JZ4N-8MDV>] (last visited Oct. 24, 2017).

⁸ *Id.*

of 1937 (AMAA)⁹ was a Depression-era statute intended to control plummeting prices for farmers,¹⁰ as well as protect the orderly supply of food to the market.¹¹ The AMAA created the framework for federal marketing orders and agreements (now administered by AMS, along with checkoff programs). In general, marketing orders and agreements, which are expressly exempt from antitrust laws, allow individual farmers “to organize for their own benefit where they would not otherwise have been able to do so,”¹² because of their sheer numbers and widespread geography, and because the terms would be deemed anti-competitive. According to one analysis, “marketing orders were part of the larger New Deal effort to shift the balance of economic power from the large aggregators to the small, independent grower.”¹³

Marketing orders are binding on an entire industry within a geographic market once they are approved by two-thirds of affected producers. They require action within the region to establish and maintain orderly market conditions, including minimum prices.¹⁴ By contrast, marketing agreements are only applicable to product handlers who voluntarily sign (but then are legally bound, as under other administrative regulations). The agreements establish quality and packaging standards, and regulate reserves and flows of product into markets.¹⁵ All these AMS-administered programs allow research and promotion, including advertising.

Since 1972, USDA has exercised its authority under the AMAA and other commodity-specific enabling legislation through AMS.¹⁶ AMS also oversees organic certification, which allows a farm to use USDA certified organic brand.¹⁷

The Commodity Promotion, Research, and Information Act of 1996 (PR Act) centralized administration of various pre-existing checkoff programs under the U.S. Secretary of Agriculture (who delegates to AMS).¹⁸ Individual checkoff promotions

⁹ Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 50 Stat. 246 (codified as amended in scattered sections 7 U.S.C.).

¹⁰ 7 U.S.C. § 602 (1)–(2) (2011).

¹¹ 7 U.S.C. § 602 (4) (2011). The 1937 Act was a reenactment of the Agricultural Adjustment Act of 1933. That statute included a tax that was declared unconstitutional. *See* *United States v. Butler*, 297 U.S. 1, 78 (1936). Accordingly, Congress reenacted the marketing provisions of the original law in 1937, without the unlawful tax. A. Bryan Endres & Nicholas R. Johnson, *Symposium, Integrating Stakeholder Roles in Food Production, Marketing, and Safety Systems: An Evolving Multi-Jurisdictional Approach*, 26 J. ENVTL. L. & LITIG. 29, 68–69 (2011).

¹² Endres & Johnson, *supra* note 11, at 71.

¹³ *Id.*

¹⁴ *Id.* The USDA recently proposed just such a Milk Marketing Order covering the state of California. *See* *Milk in California; Recommended Decision and Opportunity to File Written Exceptions on Proposal to Establish a Federal Milk Marketing Order*, 82 Fed. Reg. 10,634 (Feb. 14, 2017). The order proposes that handlers pay a minimum price and that “payments for milk be pooled and paid to individual farmers or cooperative associations of farmers on the basis of a uniform or average price.” *Id.* at 10,637.

¹⁵ *Marketing Orders and Agreements, Agricultural Marketing Service*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/rules-regulations/moa> [<https://perma.cc/SHG3-LAJX>] (last visited Mar. 8, 2017).

¹⁶ *Agricultural Marketing Service*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/agricultural-marketing-service> [<https://perma.cc/8FPZ-7QS7>] (last visited Mar. 8, 2017).

¹⁷ *Organic Regulation, Agricultural Marketing Service*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/rules-regulations/organic> [<https://perma.cc/X8T4-Q5YL>] (last visited April 1, 2017). *See supra* notes 22 through 30 and accompanying text.

¹⁸ 7 U.S.C. §§ 7411–7425 (2017).

stem from commodity-specific legislation.¹⁹ They are enacted like marketing orders, by a referendum of market participants—nationwide, however, not regionally.²⁰ Once approved, they are binding on market participants like any federal regulation.²¹ These checkoff programs have spawned free speech issues that are discussed below in Part I B.

Last, but most important to the organics market, is USDA's and AMS's responsibility for national organic standards under the Organic Foods Production Act of 1990.²²

USDA certified organic products have strict production and labeling requirements, and must be grown and processed according to federal regulations which address, among many factors, soil quality, animal husbandry practices, pest and weed control, and use of additives. . . . Certified organic handlers must use certified organic ingredients (for a minimum of 95 percent of the product) and only approved non-organic ingredients Organic producers and handlers must prevent commingling and contact of organic ingredients and products with non-organic products and substances.²³

If food or other products are to be branded as organic, every producer or handler of it must be certified.²⁴ Once certified, accredited certifying agents annually inspect organic operations to ensure regulatory compliance,²⁵ a tougher regime than non-organic federal food safety protocols impose.²⁶

At its core, organic certification is a marketing decision.²⁷ Certification allows farms and other processors to use the 'certified organic' brand.²⁸

¹⁹ Jennifer W. Zwagerman, *Checking Out the Checkoff: An Overview and Where We Are Now That the Legal Battles Have Quietened*, 14 *DRAKE J. AGRIC. L.* 149, 151 (2009).

²⁰ 7 U.S.C. § 7417(b)(1) (2017).

²¹ 7 U.S.C. § 7419 (2017) (regarding enforcement in general). For a list of all checkoff programs, as well as Federal Marketing Orders, *see* 82 Fed. Reg. 5746, 5747 (Jan. 18, 2017).

²² 7 U.S.C. §§ 6501–6522 (2017).

²³ 82 Fed. Reg. 5746, 5747 (Jan. 18, 2017).

²⁴ 7 C.F.R. § 205.100(a) (2017). An exemption applies to an operation whose annual gross organic sales are \$5000 or less. 7 C.F.R. § 205.101(a)(1) (2017).

²⁵ *Organic Enforcement, Agricultural Marketing Service*, U.S. DEP'T AGRIC., <https://www.ams.usda.gov/services/enforcement/organic/> [<https://perma.cc/E5H4-YQEE>] (last visited Jan. 17, 2017).

²⁶ For example, under the Food Safety Modernization Act (FSMA) "high-risk" facilities regulated by the Food and Drug Administration (FDA) must be inspected every three years, 21 U.S.C. § 350j (b)(1), (2) (2017), and all others every five years. 21 U.S.C. § 350j (c)(1)–(2) (2017).

²⁷ At the time when the USDA released its final rule on national organic standards, then-Agriculture Secretary Dan Glickman stated, "Let me be clear about one other thing. The organic label is a marketing tool. It is not a statement about food safety. Nor is "organic" a value judgment about nutrition or quality. USDA is not in the business of choosing sides, of stating preferences for one kind of food, one set of ingredients or one means of production over any other. As long as rigorous government safety standards are being met, we stand ready to do what we can to help support any farmer and help market any kind of food." Dan Glickman, *Release of Final National Organic Standards* U.S. DEP'T OF AGRIC., (Dec. 20, 2000), <http://www.ecomall.com/greenshopping/usdafinal.htm> [perma.cc/XE6L-PAR9].

²⁸ *Organic Certification and Accreditation, Agricultural Marketing Service*, U.S. DEP'T OF AGRIC., <https://www.ams.usda.gov/services/organic-certification/> [<https://perma.cc/2XLF-QKHY>] (last visited Mar. 8, 2017).

Alternatively, a producer can practice the same strict organic practices, without certification or use of the brand. Those non-certified producers can directly market their organic products through personal relationship with buyers, touting their organic practices and establishing personal credibility in lieu of the government-sanctioned organic brand.²⁹ Even some certified organic producers maintain that personal marketing, not a national organics promotion program, is the superior approach for organic marketing.³⁰

USDA's Notice cites increases in U.S. organic acreage,³¹ sales,³² value,³³ and imports.³⁴ Further, organic products carry a premium price.³⁵ Nevertheless, the constraints of certification limit supply to the market. For example, to convert conventional farmland into organic farmland requires a three-year transition during which the farm must adhere to all organic practices, but cannot use the organic marketing seal.³⁶ Thus, farmers endure the burden of increased production costs for three years without receiving the price benefit.³⁷ As will be discussed in Parts II and III, these inherent constraints on organic supply implicate the proposed checkoff program that aims in part, to increase demand through industry-wide promotion.³⁸

²⁹ Michael D. Veldstra et al., *To Certify or Not to Certify? Separating the Organic Production and Certification Decisions*, 49 FOOD POL. 429, 434 (2014). One analysis concluded that the organic certification scheme could be deemed an unconstitutional restraint on the free speech rights of these uncertified operations that follow all the organic standards but cannot market themselves as organic. Todd S. Heyman, *Why the Commercial Speech Doctrine Will Prove Toxic to the USDA National Organic Program*, 39 COLUM. J. ENVTL. L. 1, 25–40 (2014). As will be discussed in Part II B, such a free speech conclusion would not touch AMS-administered marketing programs since they do not implicate the first amendment. *See supra* notes 39 through 103 and accompanying text. No non-certified organic producer has pursued such a free speech challenge to certification.

³⁰ John Koskan, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Feb. 13, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-1916> [<https://perma.cc/Q2DV-7CUW>] (“Creating a checkoff creates another quasi government agency that will erode the trust of the consumer and the producer. . . . A key component in the growth of the organic industry is the trust growers built with the consumers.”); Scott Friedman, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Feb. 9, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-1873> [<https://perma.cc/KXU8-CTYS>] (“Unlike conventional ag, we are much closer to the consumer. Therefore i [sic] think an organic checkoff would be useless.”); Dianne Skoss, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Feb. 9, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-1580> [<https://perma.cc/GQV8-LJLL>] (“I am a small-scale certified organic farmer. I sell locally and know best how to reach and sell to my market. A large-scale marketing effort would benefit me NOT AT ALL.”) (emphasis in original).

³¹ 82 Fed. Reg. 5746, 5751 (Jan. 18, 2017).

³² *Id.* at 5750.

³³ *Id.* at 5751.

³⁴ *Id.* at 5755 (showing 2014 organic exports at \$553 million versus imports at \$1.2 billion).

³⁵ 82 Fed. Reg. 5746, 5751 (Jan. 18, 2017).

³⁶ 7 C.F.R. § 205.202(b) (2017).

³⁷ 82 Fed. Reg. 5746, 5756 (Jan. 18, 2017).

³⁸ *See supra* notes 118 through 203 and 204 through 230 and accompanying text.

As noted above, the checkoff programs have spawned legal results that will apply to any organic checkoff program. That case history, as well as another case that struggles with organic product differentiation, are discussed next.

B. Free Speech Issues in Agricultural Marketing

When government regulations require private parties to fund advertising, the programs raise First Amendment free speech issues, in particular issues of compelled speech. “The right not to speak is as much a constitutional freedom as is the right to speak.”³⁹ Only the speaker, not the government, possesses “the autonomy to choose the content of his own message.”⁴⁰ Compelled speech autonomy applies equally to utterances that convey opinion or belief,⁴¹ and to “statements of fact the speaker would rather avoid.”⁴²

Over the years, opponents of agricultural checkoff programs, with their mandatory funding of national ad campaigns, claimed the regulatory schemes amounted to unconstitutional compelled speech. The case history on the issue is convoluted. The last word, nevertheless, is that such programs are perfectly legal if the message is government speech, even if the agricultural community pays for the ads.⁴³

The first case that tackled free speech in agricultural marketing *Glickman v. Wileman Bros. & Elliott, Inc.*, involved a marketing order for California nectarines, plums, and peaches that included funding for generic advertising.⁴⁴ The U.S. Supreme Court’s five-member majority focused on the economic policy underlying agricultural marketing orders under the AMAA. The Court dismissed the challengers’ compelled speech complaints by stressing that detailed marketing orders “have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws.”⁴⁵ Generic advertising is just one of many collective activities that marketing orders establish. “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.”⁴⁶ The Court concluded that the complaint about funding generic advertising was no different than objections “to the marketing orders themselves because they might earn more money in an unregulated market.”⁴⁷

³⁹ Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1009 (Wolters Kluwer Law & Bus. 4th ed. 2011).

⁴⁰ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

⁴¹ *See id.* at 557 (holding that a private parade organizer could not be compelled to include an LGBT-pride marching unit). *See also* *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (striking down a New Hampshire law requiring all noncommercial vehicles to display a license plate bearing the state’s motto “Live Free or Die”); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (striking a law requiring school children to salute the flag).

⁴² *Hurley*, 515 U.S. at 573.

⁴³ *See* *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

⁴⁴ *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997).

⁴⁵ *Id.* at 469.

⁴⁶ *Id.*

⁴⁷ *Id.* at 474.

The *Wileman Brothers* majority expressed skepticism about the compelled speech complaint because the marketing orders: (1) did not preclude any producer from communicating any message to any audience;⁴⁸ (2) did not compel any actual or symbolic speech; and (3) did not compel the producers to endorse or to finance any political or ideological views.⁴⁹ Because the challengers likely agreed with the basic message of the generic advertising, “none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard from that applicable to the other anticompetitive features of the marketing orders.”⁵⁰ The free speech complaints were dismissed.

The next case, based on a checkoff program, not a marketing order, reached the opposite result. In *U.S. v. United Foods*, the Court held that the research and promotion program for mushrooms was little more than a government-mandated advertising program.⁵¹ Most of the money collected in this checkoff program funded advertising to promote mushroom sales.⁵² United Foods objected to funding generic messages that conveyed that any mushroom was worth consuming. It wanted to differentiate its branded product as superior to others. So, contrary to the majority view in *Wileman Brothers* that the challengers probably had no real quibble with the message and just did not want to pay for the generic ads, this challenger expressly objected to the generic advertising message it was compelled to fund.

Nevertheless, the Court’s basis for sustaining the free speech challenge in *United Foods* did not hinge on the offense of the compelled generic messages, but on the differences between the fruit marketing order in *Wileman Brothers* versus the mushroom promotion agreements. The *United Foods* Court focused on the detailed marketing order in *Wileman Brothers* that displaced much independent activity in the California produce market, such as pricing.⁵³ By contrast, the mushroom promotion agreement had advertising alone as “the principal objective of the regulatory scheme.”⁵⁴ The association of mushroom growers in *United Foods* had no purpose separate from the challenged speech, contrary to “the cooperative marketing structure”⁵⁵ that justified “an ancillary assessment”⁵⁶ to fund advertising in *Wileman Brothers*.

United Foods seemed to spell the end of collective advertising funded under commodity-specific checkoff programs and administered by AMS under the PR Act. To achieve a *Wileman Brothers* result, that advertising under a collective marketing scheme is constitutionally permissible, seemed to require comprehensive collective action comparable to marketing orders under the 1937 Act, but not authorized by the

⁴⁸ According to the *Wileman Bros.* Court, this point alone distinguished the case from the commercial speech analysis in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N. Y.*, 447 U. S. 557. *Central Hudson* had been the Ninth Circuit’s basis for finding the fruit marketing order unconstitutional. 521 U.S. 457, 470 at n. 12.

⁴⁹ *Id.* at 469.

⁵⁰ *Id.* at 470.

⁵¹ *United States v. United Foods*, 533 U.S. 405, 412 (2001).

⁵² *Id.* at 408.

⁵³ *Id.* at 412.

⁵⁴ *Id.* at 411–12.

⁵⁵ *Id.* at 406

⁵⁶ *Id.* at 411–12.

PR Act, or by any commodity-specific promotion legislation.⁵⁷ Otherwise, producers under checkoff agreements, that sought to avoid funding the generic commodity advertising, seemingly could claim the generic advertising program amounted to unconstitutional compelled speech under *United Foods*.

This was the position of the Livestock Marketing Association in *Johanns v. Livestock Marketing Association*.⁵⁸ The case emerged under the Beef Promotion and Research Act (the Beef Act).⁵⁹ Checkoff funds from the Beef Act were designated for “advertising, research, consumer information, and industry information.”⁶⁰ In 2004 alone, when the challenge was making its way through the courts, the assessment generated over \$47 million, of which over \$26 million was used for generic beef advertising.⁶¹

From the inception of the federal beef promotion program, Livestock Marketing Association (LMA) members objected to funding generic beef advertising. For example, organic farmers, and Angus and Hereford producers did not want to contribute to generic messages that all beef was equally safe, healthful, and high quality.⁶² Just like United Foods for mushrooms, these producers contended that the generic messages in checkoff advertising actually impeded their ability to differentiate the superiority of their specialized beef products.⁶³

Further, some domestic producers complained that the generic beef ads did not differentiate the superiority of their product over imported beef.⁶⁴ Both domestic producers and importers contributed checkoff fees, so the ads did not distinguish “beef from the United States.”⁶⁵ Some U.S. producers objected to buying ads that promoted all beef, as if imported was the same high quality as domestic, especially since mad cow disease was most commonly associated with European and Canadian beef at that time.⁶⁶

⁵⁷ See *supra* notes 9 through 21 and accompanying text.

⁵⁸ See *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005).

⁵⁹ 7 U.S.C. § 2901(b) (2005).

⁶⁰ *Id.* § 2904(4)(B).

⁶¹ Chris Clayton, *\$47.7 Million Planned for Beef Checkoff Programs*, OMAHA WORLD HERALD, (Sept. 20, 2003), <https://perma.cc/5XYZ-DH8Y>.

⁶² *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 556. (2005).

⁶³ *Id.*

⁶⁴ Transcript of Oral Argument at 37, *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2004) (No. 03-1164).

⁶⁵ *Id.*

⁶⁶ *Id.* This complaint about equal promotion of domestic and imported products re-emerges in the opposing comments to the organic Notice. See, e.g., George Kibby, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Mar. 2, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-2373> [<https://perma.cc/7ZGK-HTMB>] (“Unless language was inserted that directed funds raised to specifically promote American organic farmers and ranchers we see no reason to support it and many reasons to strongly oppose it. . . . No to Organic Chekov”). Some of these opposing comments echo U.S. domestic politics, with their complaints targeted particularly at organic imports from Mexico. See, e.g., Dale Holland, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Mar. 3, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-2337> [<https://perma.cc/AYY7-KQ5A>]. (“[A]s a small organic farmer who travels to mexico [sic] routinely, I see the abuses that so called organic corporations are guilty of. . . . I can’t imagine the corruption in organic certification and inspection in that country. These are the

Finally, dairy farmers objected that they were required to pay \$1 for every dairy cow sold even though they did not benefit from the beef ads.⁶⁷ By contrast, slaughterhouses and meat packers benefitted from beef promotion, but did not contribute to the promotion fees because the assessments pursuant to the Beef Act only apply to producers, not processors.⁶⁸ For all these reasons, *Wileman Brother's* rationale, that the challengers probably had no real objection to the generic advertising messages,⁶⁹ simply was not true of the beef ads (and will not be true for generic organic advertising either).⁷⁰

Based on *United Foods*, and easily distinguishing *Wileman Brothers*, the Eighth Circuit in *Livestock Marketing* ruled that the Beef Act's mandatory assessments to pay for generic advertising were unconstitutional.⁷¹ The beef checkoff system, and all such advertising under commodity-specific promotion programs, seemed doomed.

An argument that did not come before the Supreme Court in *United Foods*, however, redeemed the Beef Act in *Livestock Marketing* and checkoff advertising in general. USDA contended that the advertising conducted pursuant to the beef promotion program was "government speech."⁷² Accordingly, the United States would be entitled to articulate its messages without committing free speech offense to individuals who disagree with those messages.⁷³ If government, not any individuals or groups, sponsors the offending advertising, then those complaining individuals or groups are not unfairly associated with the advertised positions they fundamentally oppose⁷⁴ (and fund).

In *Livestock Marketing*, the Supreme Court concluded that the beef ads were "government speech."⁷⁵ The Beef Act statutory scheme established: (1) the general terms of the promotions, (2) the Secretary of Agriculture's control over the Board, and (3) the Secretary's "absolute veto power" over advertising proposals.⁷⁶ The Court

corporations we american [sic] farmers compete against. To give them a greater voice in the OTA and USDA doesn't help us at all.").

⁶⁷ Transcript of Oral Argument at 38, *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2004) (No. 03-1164).

⁶⁸ 7 C.F.R. § 1260.310(a) (2017).

⁶⁹ See *supra* notes 45–50 and accompanying text.

⁷⁰ Jason Lett, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Feb. 13, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-1910> [<https://perma.cc/8MB3-VURB>]. ("I create a unique product [wine] and I market it very successfully. I should be able to use my resources the way I want, rather than be forced to pay a tax to support generic marketing efforts.").

⁷¹ *Livestock Mktg. Ass'n v. U.S. Dep't Agric.*, 335 F.3d 711, 726 (8th Cir. 2003).

⁷² *Id.* at 713.

⁷³ *Id.* at 720 (citing *Rust v. Sullivan*, 500 U.S. 173, 192–95 (1991)).

⁷⁴ *Id.* at 719.

⁷⁵ *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005).

⁷⁶ *Id.* at 561. Years earlier, the Third Circuit had analyzed the question whether beef promotions under the Act were government speech and reached the opposite result. *United States v. Frame*, 885 F.2d 1119, 1132 (3d Cir. 1989). The court concluded the Beef Board was speaking for a small segment of society with discrete interests—beef sellers—whereas government is supposed to speak for the broader society based on common interests. Accordingly, the beef promotions were not government speech. The *Frame* court went on to uphold the Beef Act promotions under the lower commercial speech scrutiny of *Central Hudson*. *Frame*, 885 F.2d at 1137.

distinguished *United Foods* because it had presumed the mushroom promotions were private speech when that case was decided in 2001.⁷⁷

Even if the beef promotions are government speech, LMA argued that the Beef Act established an unconstitutional compelled subsidy by targeting its members to fund a government message that some of them fundamentally opposed.⁷⁸ The Court disagreed. A program that targets a particular market segment for funding is no different from government messages or programs that are funded out of the general public fees. Congress can tap any individuals or groups to fund its messages and programs. Checkoff fees are akin to any other general taxes paid to support any government activity.⁷⁹ Taxpayers who disagree with positions taken by their government have no first amendment basis to challenge.⁸⁰

Livestock Marketing now is the standard by which all checkoff programs are measured to determine if the promotional efforts therefrom are government speech, and thus are insulated from free speech challenges. Commodity-specific promotion statutes must provide general terms for advertising efforts. Further, the industry boards that manage such programs must be accountable to the Secretary of Agriculture, and the Secretary must have veto power over any promotions paid for by the checkoff fees. As will be discussed in Part II, the proposed organic checkoff program obviously was drafted to insure it meets these mandates for government speech treatment.⁸¹

Livestock Marketing and its legislative underpinnings are not the only free speech issues regarding agriculture marketing when organic producers attempt to differentiate their products from conventional agriculture. For example, the Food and Drug Administration (FDA) approved the use of artificial hormones in dairy cows in 1993.⁸² Immediately, organic dairies wanted to advertise that their cows were not treated with artificial hormones. FDA issued guidelines regarding advertising issues in 1994.⁸³ First, it concluded that organic milk could not be labeled as “no hormones” because bovine somatotropin (bST) is naturally found in all milk.⁸⁴ The practice at issue, however, involved injecting cows with synthetic “recombinant” growth hormone (rbST) that is made in a laboratory using genetic technology and differs by one amino acid from a cow’s natural bST.⁸⁵ FDA took the position that there is “no significant difference between milk from treated and untreated cows.”⁸⁶ Thus, labels stating that

⁷⁷ *Livestock Marketing*, 544 U.S. at 558. For a discussion of the misleading nature of the “government speech” advertising that seems to be industry messaging, see Rita Cain, *Uncle Sam Wants You – To Eat Beef?*, 11 DRAKE J. AGRIC. L. 165, 175–80 (2006).

⁷⁸ Transcript of Oral Argument at 58–59, *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2004) (No. 03-1164).

⁷⁹ *Livestock Marketing*, 544 U.S. at 559.

⁸⁰ *Id.*

⁸¹ See *infra* notes 118–203 and accompanying text.

⁸² Final Rule, Animal Drugs, Feeds, and Related Products: Sterile Somatotribove Zinc Suspension, 58 Fed. Reg. 59,946 (Nov. 12, 1993) (codified at 21 C.F.R. pts. 510, 522).

⁸³ Interim Guidance on the Voluntary Labeling of Milk and Milk Products from Cows that Have Not Been Treated with Recombinant Bovine Somatotropin, 59 Fed. Reg. 6279, 6279–80 (Feb. 10, 1994).

⁸⁴ *Id.* at 6280.

⁸⁵ See generally *Recombinant Bovine Growth Hormone*, AM. CANCER SOC’Y <https://www.cancer.org/cancer/cancer-causes/recombinant-bovine-growth-hormone.html> [<https://perma.cc/2C6Q-5UDR>] (last visited Sept. 10, 2014).

⁸⁶ *Supra* note 83, at 6280.

milk included “no artificial hormones” could mislead, because consumers might infer from such a statement “a compositional difference between milk from treated and untreated cows.”⁸⁷

Organic dairies were left with one approach to differentiate their milk from untreated cows: production claims, such as “produced from cows that received no artificial hormones.” Even treading this fine line, FDA opined that organic dairies also should include the following disclaimer with such production claims: “no significant difference has been shown between milk derived from rbST-treated and non-rbST-treated cows.”⁸⁸ According to FDA, such a disclaimer would put organic production claims in their “proper context.”⁸⁹

FDA’s approach only addressed one “context” for organic dairies’ advertising, that of alleged food safety. Organic advertisers, however, may want to inform their buyers about hormonal treatments (or lack thereof) based on animal welfare. Further, organic sellers may want to inform conscientious buyers about issues of dairy economics. Since treated cows yield more milk, this artificial increase in supply reduces price, making it harder for a small farm to compete.⁹⁰ FDA’s guidelines that focused only on safety failed to account for these other organic messaging goals. The FDA dairy guidelines were not binding, just advisory to the states.

Under its local authority to regulate dairy advertising, Ohio passed a 2008 regulation that banned all composition claims about dairy hormones as false and misleading. The Ohio regulation codified the FDA disclaimer described above, including mandates about placement, font, size, color, style, and case of that disclaimer.⁹¹

The International Dairy Food Association and the OTA challenged the Ohio regulation.⁹² The Sixth Circuit disagreed with FDA’s assumption that there is no significant difference between milk derived from rbST-treated and non-rbST-treated cows.⁹³ First, “[T]he use of rbST in milk production has been shown to elevate the levels of insulin-like growth factor 1 . . . , a naturally-occurring hormone that in high levels is linked to several types of cancers, among other things.”⁹⁴ Further, the artificial hormone may trigger an unnaturally long milk production phase, resulting in increased fat content and decreased protein in the milk.⁹⁵ Finally, “[M]ilk from treated cows

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* The FDA takes a similar view about labeling non-GMO food: statements that food is not genetically engineered may be misleading if they imply that the food is superior for health, since the FDA finds no health differences in GMO and non-GMO food. See Josh Dhyani, *Science-based Food Labels: Improving Regulations & Preventing Consumer Deception through Limited Information Disclosure Requirements*, 26 ALB. L.J. SCI. & TECH. 1, 32–35 (2016).

⁹⁰ See David Aboulafia, *Pushing RBST: How the Law and the Political Process Were Used to Sell Recombinant Bovine Somatotropin to America*, 15 PACE ENVTL. L. REV. 604, 605 (1998).

⁹¹ OHIO ADMIN. CODE, 901:11-8-01(B)(2) (Rescinded Feb. 2, 2012). Pennsylvania adopted, then dropped, a similar regulation. See Lisa Stein, *Milk and Honey, Er, Hormones*, SCI. AM. (Jan. 18, 2008), <http://www.scientificamerican.com/article.cfm?id=milk-industry-gag-order-on-artificial-hormones-lifted> [https://perma.cc/9E9T-5J8V].

⁹² *Int’l Dairy Foods Ass’n v. Boggs*, 622 F.3d 628 (6th Cir. 2010).

⁹³ *Id.* at 637.

⁹⁴ *Id.* at 636.

⁹⁵ *Id.* at 636–37.

contains higher somatic cell counts, which makes the milk turn sour more quickly and is another indicator of poor milk quality.”⁹⁶ Accordingly, the milks are not the same,⁹⁷ and compositional claims about the differences between the milks is not inherently misleading. Truthful advertising about those differences is entitled to constitutional protection.

The analysis then turned to the remaining mandatory elements of the *Central Hudson* test for permissible regulation of commercial speech: (1) whether the State’s asserted interest is substantial, (2) whether the regulation directly advances that interest, and (3) whether the regulation is no more extensive than necessary to serve the asserted interest.⁹⁸ The asserted purpose for the Ohio rule, to protect consumers from misleading labeling, was substantial.⁹⁹ On the last two *Central Hudson* requirements, however, the *Boggs* court found the regulation against compositional claims did “not directly advance the State’s interest and [was] more extensive than necessary to serve that interest.”¹⁰⁰ The court concluded that the ban on composition claims was an unconstitutional restraint on the commercial speech rights of the organic dairies.¹⁰¹ Still, the court went on to uphold some of the requirements for the font, style, case, and color requirements of the mandatory disclaimer,¹⁰² but struck down the requirement for contiguous placement of that disclaimer.¹⁰³

Clearly, *Boggs* reflects a mixed result for organic dairies. It found real differences between milk from hormone treated cows. Therefore, advertising those differences in composition claims (such as “free from artificial hormones”) would be truthful, constitutionally-protected free speech. Nevertheless, the court upheld the disclaimer that claims a lack of significant difference in the organic versus hormone-induced milk. As will be discussed below in Part II, permissible differentiation between organic and conventional agriculture will continue to be problematic in the proposed organic checkoff order. The 2014 federal legislation that spawned the organic checkoff proposal is discussed next.

C. 2014 Organic-Specific Marketing Legislation

Prior to 2014, the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act) exempted organic producers from commodity-specific promotion agreements, but only if they were 100 percent organic.¹⁰⁴ Split operations that produced part organic, part conventional crops or livestock were subject to all applicable commodity-specific promotion agreements, including for their organic output.

Split organic and conventional operations serve several purposes. They allow continued operations (and income) in a conventional product while the producer takes

⁹⁶ *Id.* at 637.

⁹⁷ *Boggs*, 622 F.3d at 637

⁹⁸ *Id.* at 638 (citing *Central Hudson*, *supra* note 48 at 566).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 639.

¹⁰¹ *Id.* at 639–40 (citing *Central Hudson*, *supra* note 48).

¹⁰² *Boggs*, 622 F.3d at 643.

¹⁰³ *Id.*

¹⁰⁴ 7 U.S.C. § 7401(e) (2014). *See also* Farm Security and Rural Investment Act of 2002, PL 107-171, 116 Stat. 134, 514 § 10607(a) (2002), which also exempts certified organic products from assessments under commodity specific promotion laws, but only if they were 100 percent organic.

the necessary three years to transition another product to organic.¹⁰⁵ Diversity also allows a producer to hedge financial risk, for example using non-organic pest or weed control on some crops when a bad weather or insect year is making it difficult to produce organically without those prohibited pesticides and herbicides.¹⁰⁶ Organic “purists” object to these practices, however, particularly because of the risk of cross-pollination of genetically engineered (higher yielding) crops with organic crops.¹⁰⁷

Regardless of the benefits or concerns about split operations, the split seemingly had nothing to do with participation in, or exemption from, a generic checkoff promotion program for any commodity. Those checkoff promotions would generate generic commodity advertising and would never address organic production and its benefits. The split-versus-solely-organic status was wholly unrelated to the commodity-specific promotion scheme. For this reason, the Agriculture Act of 2014 (2014 Farm Act) extended the FAIR Act organic exemption from commodity-specific checkoff programs to all certified organics producers, regardless of split-versus-solely-organic status.¹⁰⁸ The split producer can even grow the same commodity both organically and conventionally and claim the checkoff exemption for the organic portion.¹⁰⁹

In that same section of the 2014 Farm Act, Congress authorized USDA to issue an organic commodity promotion order.¹¹⁰ Such an order would cover all products certified to be sold and labeled “organic,” or “100% organic,” or imported with a valid organic certificate.¹¹¹ Most of the congressional findings in support of an organic promotion order address the purpose of all commodity promotion programs: to expand existing markets and develop new ones by informing consumers about the commodity through industry-funded generic advertising.¹¹² The findings also emphasize that promotion orders impose no restrictions on promotion efforts by individuals or groups covered under USDA orders.¹¹³ Such efforts are designed to increase the individual’s own market share, while the USDA program is intended to expand the entire market for the commodity.¹¹⁴ In particular, the USDA promotion orders “are of particular benefit to small producers who often lack the resources or market power to advertise on their own and who are otherwise often unable to benefit from the economies of scale available in promotion and advertising.”¹¹⁵ Notably, none of these findings are directed at “organic” or its particular need for a promotion order at this time. In fact,

¹⁰⁵U.S. DEP’T AGRIC., MAKING THE TRANSITION TO ORGANIC PRODUCTION AND HANDLING 3 (Oct. 2015), <https://www.ams.usda.gov/sites/default/files/media/Transition%20to%20Organic%20Factsheet.pdf> [<https://perma.cc/ZMN5-PLA2>].

¹⁰⁶Paul Yeager, *Split Farming Offers Benefit of Organic and Conventional Crops*, IOWA PUB. TELEVISION (March 21, 2014), <http://site.ipvtv.org/mtom/story/12353/split-farming-offers-benefit-organic-and-conventional-crops> [<https://perma.cc/L245-HE9L>].

¹⁰⁷*Id.*

¹⁰⁸7 U.S.C § 7401(e)(2) (2017).

¹⁰⁹*Id.*

¹¹⁰7 U.S.C § 7401(f)(2) (2017).

¹¹¹*Id.*

¹¹²7 U.S.C. § 7401 (b)(1)–(3), (7)–(8) (2017).

¹¹³*Id.* at (4)–(6).

¹¹⁴*Id.* at (6)–(7).

¹¹⁵*Id.* at (10).

the repeated references to “the commodity” in these findings suggest that the differences between traditional commodity-specific promotion orders and one for the entire organic industry, its methods, and all its products, were not addressed by Congress when authorizing a promotion order for all organics. Such differences will be explored in Part II.

Finally, according to the 2014 Act, if such an organic promotion order is adopted, the 1996 FAIR Act organic exemption from commodity-specific checkoff programs, just described above, will expire for all organics, sole and split.¹¹⁶ Instead of a complete exemption, any (now-exempt) organic operations could elect to be subject to either the new organic promotion order, or its applicable commodity-specific promotion order.¹¹⁷

In January 2017, based on a request by the OTA, USDA proposed just such an organic checkoff program. The details of that Notice are discussed next.

II. THE PROPOSED ORGANIC PROMOTION AND RESEARCH PROGRAM

This section explains the main elements of the organic proposal and compares and contrasts it to existing AMS-administered marketing orders, agreements, and checkoff programs. This section critiques various aspects of the proposal, and incorporates some of the public input filed during the comment period.

A. Scope

The scope of participants and products in the proposed checkoff program is one of the most distinguishing features from existing AMS programs. The organic program would cover all products certified to be sold and labeled “organic,” or “100% organic,” or imported with a valid organic certificate.¹¹⁸ Unlike every other U.S. agricultural marketing program that is commodity specific, the organic program would cover all varieties of food, as well as non-food offerings, from soap to nuts.¹¹⁹

The organic proposal incorporates the broadest market participation, compared to existing U.S. agricultural marketing schemes. For example, marketing orders cover all

¹¹⁶7 U.S.C. § 7401(e)(4) (2017).

¹¹⁷7 U.S.C. § 7401(f)(3) (2017). These operations are called “dual-covered commodities” in the USDA Notice. *See e.g.*, 82 Fed. Reg. 5746, 5759 (Jan. 18, 2017). As will be discussed below, the only organic exemption that will survive adoption of an organic promotion order will be based on the small size of the organic operation. *See supra* notes 138 through 150 and accompanying text.

¹¹⁸7 U.S.C. § 7401(f)(2) (2017).

¹¹⁹Organic Research, Promotion, and Information Order, 82 Fed. Reg. 5746 (proposed Jan. 18, 2017.) The Notice specifically sought comments on the inclusion of non-food items such as flowers, pet food, and personal care products in the program. *Id.* at 5748. The distinction between food and “non-food” organic items may be ambiguous. While personal care items, such as soap, obviously are not food, they are made with organic food ingredients, such as grains, oils, and herbs. *See, e.g.*, *Our Ingredients*, VERMONT SOAP (2017) <http://vermontsoap.com/about-our-soap/our-ingredients/> [<https://perma.cc/NUQ2-JLRY>]. Some flowers (characterized as non-food in the Notice) are edible. *See, e.g.*, *Specialty Greens & Edible Flowers*, CHERRY VALLEY ORGANICS, <http://www.cherryvalleyorganics.com/specialty-greens-edible-flowers> [<https://perma.cc/UW43-JGX6>]. A few existing checkoff programs govern non-food agricultural products such as paper, *see* 7 C.F.R. § 1222 (2013); Christmas trees, *see* 7 C.F.R. § 1214 (2011); and lumber, *see* 7 C.F.R. § 1217 (2011). Each of these are separate checkoff programs, however.

market participants for a specific commodity, but are limited to a geographic region.¹²⁰ Marketing agreements cover market participants of a particular commodity who voluntarily agree to participate, again in a confined growing region.¹²¹ Existing checkoff programs are national, not regional,¹²² but differ by commodity regarding participation along the chain of distribution. For example, the egg program only includes (and assesses) egg producers.¹²³ By contrast, the lamb program includes producers, seedstock producers, feeders, and first handlers, but not importers.¹²⁴ As discussed above, the inclusion of importers in the beef promotion program was one of the complaints in *Livestock Marketing Association*.¹²⁵ The proposed organic checkoff program would include all of growers, handlers, non-food manufacturers, and importers of food and non-food. Clearly, the proposed organic program will be the most complex and diverse of anything previously administered by AMS.

B. Assessments

The proposed organic program becomes even more distinctive from traditional agricultural marketing schemes regarding the assessment on participants. The Notice estimates that the proposed assessment would yield \$25.3 million annually.¹²⁶ The economic implications of this (and all checkoff assessments) could make an entire paper alone.¹²⁷ This section addresses only basics of the proposed payment scheme to

¹²⁰7 U.S.C. § 608c(1)–(2) (2017). Based on 2500+ early comments, the diverse and inclusive approach is favored, not opposed.

¹²¹7 U.S.C. § 608b(a) (2017). In 2009, the USDA proposed a national leafy greens marketing agreement, but never enacted it for concerns that its safety goals overlapped too much with the FDA's jurisdiction under the Food Safety Modernization Act. National Marketing Agreement Regulating Leafy Green Vegetables; Termination of Proceeding on Proposed Marketing Agreement, 78 Fed. Reg. 73,111-12 (Dec. 5, 2013).

¹²²See generally *Research & Promotion, Agricultural Marketing Service*, U.S. DEP'T AGRIC., <https://www.ams.usda.gov/rules-regulations/research-promotion> [<https://perma.cc/6HZC-Y4D2>] (referring to “national” programs in several places) (last visited Feb. 6, 2017). The programs are mandatory on all covered market participants once approved according to the statutory voting requirements.

¹²³*American Egg Board, Agricultural Marketing Service*, U.S. DEP'T AGRIC., <https://www.ams.usda.gov/rules-regulations/research-promotion/eggs> [<https://perma.cc/T7RG-37YA>] (last visited Oct. 24, 2017).

¹²⁴*American Lamb Board, Agricultural Marketing Service*, U.S. DEP'T AGRIC., <https://www.ams.usda.gov/rules-regulations/research-promotion/lamb> [<https://perma.cc/A4EV-N58Z>] (last visited Feb. 3, 2017).

¹²⁵See *supra* notes 58 through 81 and accompanying text.

¹²⁶82 Fed. Reg. 5746 at 2569.

¹²⁷Certainly, the efficacy of agricultural advertising programs has been studied and debated for years. See e.g., Bradley J. Rickard et al., *Consumer Response to Commodity-Specific and Broad-Based Promotion Programs for Fruits and Vegetables*, 93 AM. J. AGRIC. ECON. 1312 (2011), https://www.researchgate.net/profile/Harry_Kaiser/publication/227464081_Consumer_Response_to_Commodity-Specific_and_Broad-Based_Promotion_Programs_for_Fruits_and_Vegetables/links/0c96053223c1975f17000000.pdf. (reporting multiple conclusions about commodity-specific versus generic “fruits and vegetables” advertising on consumer demand); Michael K. Wohlgenant, *Retail-to-Farm Transmission of Generic Advertising Effects*, 21 CHOICES (2006), <http://www.choicesmagazine.org/2006-2/checkoff/2006-2-04.htm> [<https://perma.cc/5PAB-H5GR>] (explaining the variety of factors that affect advertising's potential to improve producer prices); Jennifer Ferrero et al., *Annotated Bibliography of Generic Commodity Promotion Research (revised)*, THE NATIONAL INSTITUTE FOR COMMODITY PROMOTION RESEARCH AND EVALUATION (1996), https://www.researchgate.net/profile/Harry_Kaiser/publication/267838176_Annotated_Bibliography_of_Generic_Commodity_Promotion_Research_revised/links/54b90ed40cf28faced6269ac/Annotated-Bibliography-of-Generic-Commodity-Promotion-Research-revised.pdf; H.F. Carman et al., *Commodity Advertising Pays . . . or Does it? What it Takes to Keep those Raisins Dancing?*, 46 CALIF.

fund organic research and promotion, and the proposed allocation of those funds. The analysis compares and contrasts the organic proposal to existing commodity-specific programs since those existing programs can trigger an exemption from the organic program.

1. Who Pays and How?

Currently, 19 of the 22 commodity-specific checkoff programs assess participants on a per-unit basis, whether that be per-egg, per-animal, per-pound, or per other unit.¹²⁸ In a few cases, the per-unit assessment is different at different places in the chain of distribution.¹²⁹ The \$18 per ton assessment on blueberries is only charged above 2,000 pounds.¹³⁰

Under traditional tax policy terminology, these mandatory fees in checkoff programs impose a flat or proportional tax: all participants pay the same rate on their own output, regardless of their output volume or revenue.¹³¹ These assessments are regressive because the relative impact on spending power from the flat fee is much greater for those with smaller incomes.¹³² When programs only assess above a threshold, like the blueberry terms, the program is incorporating elements of progressivity to its tax.¹³³

Because the proposed organic checkoff encompasses all organic products, food and non-food, it would be impossible to adopt a common “per-unit” approach for the

AGRIC. 8 (1992) <http://californiaagriculture.ucanr.org/landingpage.cfm?article=ca.v046n02p8&fulltext=yes>—<https://perma.cc/NB98-B5DA> (“Thus, it appears that advertising and promotion expenditures exceeding \$100 million annually are based more on faith than on hard analytical evidence.”).

¹²⁸Starting from the AMS CHECKOFF website, each commodity-specific board has a linked page. See *Research & Promotion, Agricultural Marketing Service*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/rules-regulations/research-promotion> [<https://perma.cc/CA6Z-473W>] (last visited Feb. 4, 2017). The first page for each program usually explains the assessment in the program description. For cotton and mangoes, assessments are described on separate commodity web sites that is reached by navigating through the board link on the AMS page. See COTTON BD., ANNUAL REPORT 3 (2016), <http://www.cottonboard.org/sites/454/uploaded/files/2015AnnualReport.pdf> [<https://perma.cc/82H4-7CJ9>]; NATIONAL MANGO BD., *Assessments and Exemptions*, <http://www.mango.org/en/Utility/About-the-NMB/Industry-Compliance/Assessments-and-Exemptions> [<https://perma.cc/M7W2-R7KB>] (2017).

¹²⁹Lamb producers, seedstock producers, and feeders pay \$.007 per pound, and first handlers pay \$.42 per pound. Lamb importers are not assessed. *American Lamb Board, Agricultural Marketing Service*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/rules-regulations/research-promotion/lamb> [<https://perma.cc/GKU2-L2YN>] (last visited Feb. 4, 2017).

¹³⁰*Highbush Blueberry Council, Agricultural Marketing Service*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/rules-regulations/research-promotion/blueberry> [<https://perma.cc/M894-TV6X>] (last visited Feb. 4, 2017). Small producer exemptions in checkoff commodity-specific agreements and in the organic checkoff proposal are discussed below. See *infra* notes 138–59 and accompanying text.

¹³¹See generally *Understanding Taxes*, IRS, <https://apps.irs.gov/app/understandingTaxes/student/glossary.jsp#regressivetax> [<https://perma.cc/MSZ3-WEJ8>] (last visited Oct. 24, 2017). The IRS glossary also calls flat taxes “proportional.”

¹³²See *Proportional Tax*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/proportionaltax.asp> [<https://perma.cc/7G6J-XAE8>] (last visited Feb. 7, 2017). The U.S. Internal Revenue Service only characterizes a tax as regressive when those with higher incomes actually pay a lower percentage than those with less income. See *Understanding Taxes*, IRS, <https://apps.irs.gov/app/understandingTaxes/student/glossary.jsp#regressivetax> [<https://perma.cc/6JA6-AH48>] (last visited Oct. 24, 2017). The IRS approach does not address the greater financial burden of the flat tax on lower income payers.

¹³³*Progressive Taxes*, INVESTOPEDIA, <http://www.investopedia.com/terms/p/progressivetax.asp> [<https://perma.cc/5KUP-ZVJT>] (last visited Feb. 7, 2017).

organic assessment. The alternative assessment method proposed for organics is reflected in three current commodity-specific checkoff programs. Peanut, sorghum and soybean producers are assessed as a percentage of sales. Soybean producers pay half of one percent of the net market price.¹³⁴ Sorghum producers are assessed “0.6 percent of the net market value of grain sorghum and 0.35 percent of the net market value of sorghum forage, silage, hay, haylage, and billets,”¹³⁵ including imports (which are very limited according to the same source).¹³⁶ Peanut producers pay “1 percent of the total value of all farmers’ stock peanuts.”¹³⁷ The regressive effect of the flat tax is heightened in the peanut agreement, when small producers pay the same percentage on *all peanut sales*, including those of much larger producers, rather than just on their own sales.

The organic proposal employs the approach of the soybean and sorghum programs, assessing a flat rate of one-tenth of one percent of net organic sales for producers and handlers, and one tenth of one percent of the transaction value of organic products imported into the United States for importers.¹³⁸ “Net organic sales” is defined in the proposal as gross sales in organic products minus (a) the cost of certified organic ingredients, feed, and agricultural inputs used in the production of organic products and (b) the cost of any non-organic agricultural ingredients used in the production of organic products.¹³⁹ The regressive nature of the proposed assessment (like all flat-tax assessments) feeds complaints that large-producer influence pervades USDA, OTA, and this organic marketing proposal.¹⁴⁰

¹³⁴*United Soybean Board, Agricultural Marketing Service*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/rules-regulations/research-promotion/soybean> [<https://perma.cc/H6BJ-JQDK>] (last visited Feb. 6, 2017). This assessment also applies to “[a]ny producer marketing processed soybeans or soybean products of that producer’s own production.” 7 C.F.R. § 1220.223(a)(1) (2017). In these cases of processed soybeans or soybean products, the .5% assessment applies to “the net market price of the soybeans involved or the equivalent thereof.” 7 C.F.R. § 1220.223(a)(2) (2017).

¹³⁵*Sorghum Board, Agricultural Marketing Service*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/rules-regulations/research-promotion/sorghum> [<https://perma.cc/2U84-PRFX>] (last visited Feb. 6, 2017).

¹³⁶“Net market value” for sorghum is found by multiplying the net market price by volume unit, or “the minimum value in a production contract received by a producer for sorghum after adjustments for any premium or discount.” 7 C.F.R. § 1221.17(a) (2017).

¹³⁷*National Peanut Board, Agricultural Marketing Service*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/rules-regulations/research-promotion/peanut> [<https://perma.cc/DN68-MXLT>] (last visited Feb. 6, 2017). “Total value” as characterized on the Peanut Board website is expressed in the regulation as “price paid for all farmers[’] stock peanuts sold.” 7 C.F.R. § 1216.51(c) (2017).

¹³⁸Organic Research, Promotion, and Information Order, 82 Fed. Reg. 5746 (proposed Jan. 18, 2017). The NOTICE estimates that fourteen percent of the assessment revenue would come from producers, eighty-one percent would come from handlers, and five percent would be from importers. *Id.* at 5769. At least one commenter in the rulemaking docket complained about the assessment approach: Francoise LaMonica, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Mar. 3, 2017), (“Small family farmers will be disproportionately affected.”).

¹³⁹82 Fed. Reg. 5746 at 5760. Any multi-ingredient or processed product must contain at least 95 percent organic ingredients to be called “organic” (rounding down, not up). 7 C.F.R. § 205.301(b) (2017). The other five percent must be from ingredients approved for use in organic products. 7 C.F.R. § 205.605–06 (2017).

¹⁴⁰See Erin Toomey, *Note: How Organic is Organic? Do the USDA’S Organic Food Production Act and National Organic Program Need an Overhaul?*, 19 DRAKE J. AGRIC. L. 127, 138–40 (2014); See also Stephanie Strom, *Has ‘Organic’ Been Oversized?* N.Y. TIMES BU1 (Jul. 8, 2012). The opposition comments to the proposal are replete with complaints that OTA and the proposal are biased in favor of large producers.

Exempt from the assessment, at their choosing, would be organic producers and handlers with gross organic sales of \$250,000 or less for the previous marketing year, and importers with \$250,000 or less in transaction value of imports. According to USDA, there were 21,781 certified organic operations in the United States in 2016.¹⁴¹ According to OTA, at least 2000 certified operations self-reported to OTA that they were under the \$250,000 threshold.¹⁴² Other data suggest the number of small organic producers could be much greater than 2000, since 90 percent of all farms (organic and conventional) fall under the \$250,000 sales number.¹⁴³

Although the *de minimis* exemption in the proposal provides some progressivity to the tax scheme, it is a contentious provision.¹⁴⁴ Some complain it would exclude far too many market participants, and the organic program will only help large operations¹⁴⁵ (as many as ninety percent if the overall small farm percentage applies in organic). This is claimed even though the *de minimis* exemption is optional.¹⁴⁶ This

See, e.g., Pat Momich, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures, 82 Fed. Reg. 5746 (Feb. 23, 2017) <https://www.regulations.gov/document?D=AMS-SC-16-0112-2250> [<https://perma.cc/S8HN-PBR9>] (“Unfortunately, the overwhelming majority of OTA members are large corporations [sic].”).

¹⁴¹USDA Reports Record Growth In U.S. Organic Producers, *Off. Comm.*, U.S. DEP’T AGRIC., <https://www.usda.gov/wps/portal/usda/usdahome?contentid=2016/04/0084.xml> [<https://perma.cc/22CL-6PB6>] (last visited Apr. 4, 2016).

¹⁴²ORGANIC TRADE ASS’N, LETTER TO ELANOR STARMER 15 (May 3, 2016), <https://www.ams.usda.gov/sites/default/files/media/Revised%20Organic%20TA%20Proposal%20Bundle%2005%2002%2016.pdf>.

¹⁴³CORNELL UNIVERSITY, *Small Farm Statistics*, <http://smallfarms.cornell.edu/about/statistics-and-information-resources/> [<https://perma.cc/KA7Z-XH75>] (2017).

¹⁴⁴82 Fed. Reg. at 5750. One commenter complained, however, that small farms must opt in to claim the exemption, thus imposing an annual documentation and submission burden in order to not to be assessed. John Kenny, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures, 82 Fed. Reg. 5746 (Feb. 17, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-2083>. [<https://perma.cc/9J65-QZ9M>] Mr. Kenny correctly interprets the proposed rule for claiming the *de minimis* exemption. 82 Fed. Reg. at 5768.

¹⁴⁵A search for the term “large” in 2459 comments that had been filed in the rulemaking as of March 8, 2017, yielded fifty-one comments. Most used the term in the way discussed here, such as “large operations” or “large farms.” Only one of those commenters supported the proposal. Melissa Barker, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures, 82 Fed. Reg. 5746 (Feb. 9, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-1760> [<https://perma.cc/94NU-6ARV>]. One requested an extension to file comments because of a need to survey its members over a “large geographical area.” Organic Farmers’ Agency for Relationship Marketing, Inc., Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures, 82 Fed. Reg. 5746 (Feb. 16, 2017) <https://www.regulations.gov/document?D=AMS-SC-16-0112-1999> [<https://perma.cc/X63H-PZ7U>]. The remaining forty-nine opposed the proposal. *See, e.g.*, Cynthia Sawtell, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures, 82 Fed. Reg. 5746 (Mar. 3, 2017) <https://www.regulations.gov/document?D=AMS-SC-16-0112-2343>. [<https://perma.cc/2N2Q-A3B7>] (“Organic farmers do not need to be burdened with bureaucratic processes that only large agricultural operations can afford and which serve only to blur the lines between industrial ‘organic’ food and the real thing.”).

¹⁴⁶*See Northeast Organic Dairy Producers Alliance*, 16 NODPA NEWS 1, 5 (July 2016) <http://www.nodpa.com/july2016-low-res-final.pdf> [<https://perma.cc/8QBQ-KH57>] (asserting that the \$250,000 exemption excludes sixty percent of the industry). *See also* Elizabeth Henderson, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures, 82 Fed. Reg. 5746 (Feb. 23, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-2248>. [<https://perma.cc/94HA-PBMT>] (“The vast majority of organic

complaint assumes all exempt parties will opt out (to avoid the regressive tax) and assumes that no organic operation outside the program would receive any benefit from the program.

Other commenters complain that the \$250,000 exemption is too low and sweeps too many into mandatory assessments they cannot afford.¹⁴⁷ Still others hail its libertarian approach because the proposal does not exclude any organic operation, instead leaving the small farm to opt in or out:

If a small operation chooses to participate, it does so at the same rate – and with the same voting and representation rights – as any other participating organic stakeholder. This approach ensures that no organic operation that wants to participate is excluded – while also ensuring that no small organic operation is compelled to participate.¹⁴⁸

This seemingly libertarian quality is significantly tempered by a caveat to the *de minimis* exemption, however. All qualifying organic participants that vote in the initial referendum (that would establish or derail the program at the outset) waive their *de minimis* exemption if the referendum passes. They would be assessed under the checkoff program for a majority of years until the next referendum.¹⁴⁹

Based on the following likely voting pattern, this waiver provision has the potential to drastically skew the initial referendum in favor of passage, accomplished mostly by large organic participants. First, the referendum outcome will be based on a majority of votes cast, not on the preference of a majority of all eligible organic certificate holders.¹⁵⁰ Opting out of the referendum is not a ‘No’ vote. Only opting in and voting ‘No’ registers as a ‘No’ vote, but also waives the small farm exemption for four of the

farmers sell less than \$250,000 worth of product. This program is designed to deprive these farmers of a significant voice in the decisions about this check-off program.”).

¹⁴⁷See, e.g., Stina Booth, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures, 82 Fed. Reg. 5746 (Feb. 22, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-2202> [<https://perma.cc/2LAV-ZYPG>] (advocating a \$500,000 threshold for participation).

¹⁴⁸Melissa Barker & Nathaniel Lewis, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures, 82 Fed. Reg. 5746, at 2 (Feb. 9, 2017) <https://www.regulations.gov/document?D=AMS-SC-16-0112-1760> [<https://perma.cc/AAP9-DKHF>]. Interestingly, these commenters are only in the final year of transitioning their farm to organic production. *Id.* at 1. As a non-organic beef, lamb and egg producer, (see OYSTER BAY FARM, <http://www.oysterbayfarm.com/description> [<https://perma.cc/V5VD-6MTF>] (last visited Oct. 24, 2017) their farm previously would have been assessed under three separate commodity-specific programs. See *supra* note 21 and accompanying text. As a dual-covered operation under the organic proposal, they will have the option to be assessed under only the organic program. See *supra* notes 152 through 159 and accompanying text.

¹⁴⁹82 Fed. Reg. 5746 at 5774. These otherwise exempt parties who waive their exemption in order to vote are characterized as “voluntarily assessed entities.” *Id.* at 5758. The next referendum would be in seven years. *Id.* at 5774. Thus, the voluntarily assessed entities would be waiving their exemption for four of the seven years.

¹⁵⁰82 Fed. Reg. at 5773. “One Entity–One Vote” will apply, not one vote per organic certificate as the OTA had proposed. *Id.* Organic certifiers have the freedom to issue individual certificates for each organic crop a farm produces, or not. Thus, under the OTA proposal, votes could be multiplied for one entity, or not, simply based on who did its certifying. For this reason, and for consistency with the voting rights in other checkoff programs, the USDA proposed One Entity–One Vote. *Id.* Nevertheless, OTA’s original approach lends further support to the impression that OTA is the mouthpiece of large organic operations, since they would be more likely to have more organic certificates.

seven years until the next referendum.¹⁵¹ Thus, very small organic participants, that have never come close to the \$250,000 annual sales threshold, almost certainly will opt out of voting to preserve their *de minimis* exemption, no matter how strongly they might oppose the proposal. They cannot afford to vote ‘No’ because of the possibility the referendum would pass and they would be “voluntarily” assessed. Further, by opting out to preserve their \$250,000 exemption, these small sellers might benefit from the research and promotion activities of the program without having to pay for the foreseeable future. Based on the foregoing data, this group of non-voters could be anywhere from 10–90 percent of certified organic operations.

The next group inclined to vote against the program on purely economic grounds would be those organic operations that are just at or near the \$250,000 exemption threshold. The flat tax is most regressive for these at the bottom of the tax base. To avoid assessments in the years they go over the exemption threshold, they would want to vote against the proposal to prevent its passage. These likely ‘No’ voters, would become “voluntarily assessed” participants in the program, however, if the proposal passed despite their ‘No’ votes. To avoid that result, these most disproportionately affected by the flat tax likely would opt not to vote at all, to preserve their *de minimis* exemption for those years they qualified. Nevertheless, if the referendum passed they would be assessed in subsequent years they exceeded \$250,000, without ever having voted on the program.¹⁵²

Finally, large producers who have no possibility of being exempt, will vote in favor of the referendum because they will reap the most benefits from the research and promotion with less financial impact from the regressive tax. Thus, the referendum outcome will be driven by large organic participants. This outcome would reinforce the perception that USDA’s current oversight of organic is stacked with large agribusiness representatives, and would further the complaint that OTA, which crafted these voting dynamics, is monopolized by large, industrial food interests.¹⁵³

The other so-called “exemption” from assessment applies to organic producers, handlers or importers of “dual-covered” commodities. These are the 22 commodities that are currently covered by a federal commodity-specific checkoff program, from which all organic producers currently are expressly exempt.¹⁵⁴ As noted above, the 2014 Farm Act that authorized an organic checkoff program will eliminate the current

¹⁵¹One commenter correctly explains that a very simple voting process could be undertaken in each certificate holders’ annual certification or recertification process. Kyle Kuta, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures, 82 Fed. Reg. 5746 (Feb. 13, 2017) <https://www.regulations.gov/document?D=AMS-SC-16-0112-1890> [<https://perma.cc/SA5P-JKFG>] (“It would be simple enough to open this rule up for a vote via organic certifiers during annual reviews of each operation - The survey would surely take no more than 10 minutes.”)

¹⁵²As NOPDA points out, those who are over the *de minimis* cap at the time of the referendum get to vote, but could fall under in subsequent years and then would not have to pay. By contrast, those who were under the *de minimis* exemption and opted to be voluntarily assessed in order to vote, would be locked in subsequently, regardless of where they stood relative to the cap. *See supra* note 146, at 5. NOPDA complains that these voluntarily assessed are locked in for seven years, but that aspect of the original OTA proposal was revised down to a majority of seven years under the USDA proposed rule.

¹⁵³*See supra* note 140 and accompanying text.

¹⁵⁴*See supra* notes 104 through 117 and accompanying text. Note that each commodity-specific program has different coverage for producers, handlers, and importers. Thus, the scope of the proposed organic program may not overlap all the existing programs exactly for purposes of the discussion here of the dual covered commodities.

organic exemption from commodity-specific assessments if an organic program passes.¹⁵⁵ Thus, upon a successful referendum, organic operations in the 22 dual-covered commodities, that previously were exempt from any assessments (regardless of the size of the organic operation), now will be required to pay into one or the other program. These organic operations “would need to elect to pay assessments to the commodity specific program (e.g., highbush blueberries, beef, dairy, almonds, etc.), or the organic commodity promotion program.”¹⁵⁶ The election by the dual-covered operation to opt out of one program is contingent on certifying that the operation has paid the other assessment.¹⁵⁷ Thus, this election does not allow for use of any *de minimis* exemptions in the organic proposal (just discussed), or available in certain commodity-specific agreements, such as blueberries.¹⁵⁸ The only choice for these dual-covered organic operations would be to pay one assessment, not two. This is the case even though they currently are exempt from paying under their commodity-specific programs, and they might qualify for the small farm exemption under the proposed organic program or their commodity-specific program.¹⁵⁹

This mandatory assessment for organic participants in these 22 commodities, no matter how small, is not an unintended result of a drafting glitch. Rather, it is precisely one of the assessment scenarios anticipated in the Notice:

Joe Smith is a certified organic producer, producing only organic beef on his operation and has gross organic sales of \$100,000 for the previous marketing year. . . . [H]e does produce a commodity subject to assessment under another commodity promotion order, the Beef Promotion and Research Order . . . which states that the funds for the order are paid from assessments on producers at a rate of one dollar per head of cattle. There is no *de minimis* exemption under the Beef Order. While \$100,000 in organic beef sales is less than the \$250,000 *de minimis* threshold for the proposed Order, Joe cannot claim he is exempt from the Beef Order . . . then claim he is also exempt from the proposed Order. Under this scenario, Joe could either (a) pay his assessments into the Beef Order or (b) pay assessments on the \$100,000 in organic beef sales to the proposed Order.¹⁶⁰

¹⁵⁵See *id.* and accompanying text.

¹⁵⁶82 Fed. Reg. 5746 at 5771.

¹⁵⁷*Id.*

¹⁵⁸See *supra* note 130 and accompanying text.

¹⁵⁹See 82 Fed. Reg. 5746 at 5771. Supporters of the proposal herald the dual-commodities treatment as an example of “self-determination,” which is “a hallmark of the organic sector.” See Barker & Lewis, *supra* note 148, at 2. See also Bill Wolf, Katherine DiMatteo & Sandy Mays, Comment on the Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures, 82 Fed. Reg. 5746 at 2 (Feb. 22, 2017), https://www.regulations.gov/document?D=AMS-SC-16-0112-2135_[<https://perma.cc/MUJ9-EPDH>]. The one determination the proposal does not retain, however, is the choice to be “checkoff free” as organic producers currently enjoy. Commenters Wolf, DiMatteo and Mays are organic consultants whose clients include the OTA. Wolf has served on the board of the OTA and DiMatteo was its executive director for sixteen years. Wolf, DiMatteo & Associates, *Our Experience, Meet Our Team*, <https://www.organicpecialists.com/experience.html> [<https://perma.cc/4FHF-XSAL>] (last visited Mar. 7, 2017).

¹⁶⁰82 Fed. Reg. 5746 at 5772.

To be free of any checkoff assessments (as they currently are), organic producers of any of the 22 dual covered commodities would need to oppose the organic checkoff proposal and work to see it voted down. Then the 1996 FAIR Act organic exemption from commodity-specific assessments would survive. Joe Smith from the foregoing example would be one such party. As discussed above, however, he could not vote ‘No’ in the referendum, to try to defeat the proposal, without opting into the organic assessment for four years, if it passes.

These convoluted, interconnected provisions, resulting in loss of the small farm exemption when an organic operation is covered by one of the commodity-specific checkoff programs, adds more fuel to the criticism that OTA was reflecting its Big Ag bias in drafting and advocating for this proposal.¹⁶¹

2. *What Does the Assessment Buy?*

Abundant data in the Notice reflect that organic demand by consumers, as well as producer demand for organic raw materials, outpaces current supply.¹⁶² Thus, increasing domestic organic production is a central goal of the proposed organic checkoff program. According to the OTA, the proposed organic checkoff program “could aim at increasing organic acreage by funding farmer education programs on organic certification, organic labeling, and organic farming techniques to help encourage farmers to transition to organic and help them during the transition period.”¹⁶³

Historically, AMS-administered checkoff programs emphasized consumer-targeted promotion, not production or other agricultural research. In *United Foods*, the Supreme Court emphasized that the mushroom checkoff program almost exclusively funded advertising.¹⁶⁴ *Livestock Marketing* also noted that the vast majority of the beef assessment was spent on generic advertising.¹⁶⁵ Today, most commodity-specific programs spend a majority of their assessments on promotion.¹⁶⁶

¹⁶¹Leah Douglas, *Got Organic?*, SLATE (May 14, 2015), http://www.slate.com/articles/life/food/2015/05/organic_checkoff_proposal_why_farmers_oppose_the_organic_trade_association.html [<https://perma.cc/LQ4W-82L9?type=image>].

¹⁶²82 Fed. Reg. at 5756.

¹⁶³*Id.*

¹⁶⁴*See supra* notes 51–56.

¹⁶⁵*See supra* notes 61, 62 and accompanying text.

¹⁶⁶The latest commodity-specific checkoff program annual reports were accessed by following each commodity board’s link on the AMS checkoff website, *supra* note 4, then navigating around or searching for the annual report links. The following marketing or promotion expenditures (where discernible) were calculated as a percentage of the annual assessment:

Eggs: 60.67% for “Consumer Marketing” and “Egg Product Marketing.” *See* AM. EGG BD., ANNUAL REPORT 29 (2015) <http://www.aeb.org/images/PDFs/AboutAEB/2015AEBAnnualReport.pdf> [<https://perma.cc/9E9N-7TPH>]. Lamb: 54.8% of total expenditures for “Promotion.” *See* AM. LAMB BD., ANNUAL REPORT 5 (2015), http://lambresourcecenter.com/wpcontent/uploads/2015/09/ALB_AnnualReport2015_020816.pdf [<https://perma.cc/JBY5-2XKD>]. Beef: 18.8% for “Promotion,” 18.3% for “Consumer Information.” *See* CATTLEMEN’S BEEF BD., ANNUAL REPORT 2 (2016), <http://2016annualreport.beefboard.org> [<https://perma.cc/29M6-K24T?type=image>]. This expenditure for “consumer information” reflects why the organic proposal emphasized that the “information” allocation must be a majority on producer information, since consumer information could be another term for market research, a classic promotion-related expense. *See supra* note 174 and accompanying text. Christmas Trees (Promotion Committee Budget for 8/16-7/17): 56.5%. *See* CHRISTMAS TREE PROMOTION BD., PROMOTION COMMITTEE BUDGET 2 (2017), <http://www.christmastreepromotionboard.org/wp-content/uploads/2017/02/FY2016->

By contrast, on its face the proposed organic assessment would not be an advertising fund, primarily. Only twenty-five percent of the program's annual budget would be allocated to promotion.¹⁶⁷ Equal twenty-five percent portions would be allocated to each of research and information about the organic sector.¹⁶⁸ The final twenty-five percent would be discretionary.¹⁶⁹ No funds can be shifted from one of these categories to another without USDA approval.¹⁷⁰ Any unexpended funds in any category for a given year will carry over within the same category for the next year.¹⁷¹

The research and information allocations are further restricted. At least half the research funds must be devoted to agricultural research¹⁷² (as opposed to market research, for example). The Notice cites evolving pest management strategies as an example of the agricultural research that could be funded by the assessments.¹⁷³ Similarly, a majority of the information funds must be devoted to producer information (as opposed to consumer data, for example).¹⁷⁴

2017-Budget.pdf [https://perma.cc/B9RP-82DN]. Cotton: 39%. *See* COTTON BD., ANNUAL REPORT 4 (2015), <http://www.cottonboard.org/sites/454/uploaded/files/2015AnnualReport.pdf> [https://perma.cc/9CUT-6L7L].

Haas Avocados: 56% (after rebates of assessments to state and international programs). *See* Haas AVOCADO BD., ANNUAL REPORT 15 (2015), https://www.hassavocadoboard.com/sites/default/files/pdf/annual_reports/2015-hab-annual.pdf [https://perma.cc/W93P-PPXB].

Blueberries: 63.66%. *See* U.S. Highbush BLUEBERRY COUNCIL, ANNUAL REPORT 43 (2015), <http://www.blueberry.org/wp-content/uploads/2016/09/2015-2016-Annual-Report-web-version.pdf> [https://perma.cc/4XBV-ESBW]. Mushroom Board reports a combined research and information expenditure of 85.7%. *See* MUSHROOM COUNCIL, ANNUAL REPORT 35 (2015), <http://www.mushroomcouncil.org/wp-content/uploads/2012/02/Mushroom-Council-Annual-Report-2015.pdf> [https://perma.cc/DNN5-5HSN]. Honey: 81.79%. *See* NAT'L HONEY BD., ANNUAL REPORT 28 (2013), <http://www.honey.com/images/uploads/general/AR/> [https://perma.cc/2J6S-QUXT].

Mango: 57.43%. *See* NAT'L MANGO BD., ANNUAL REPORT 18 (2015), http://www.mango.org/getattachment/516b89bf-9f27-4105-b90e-56c1809e7b64/EN_Mango-Annual-Report-2015_FINAL.pdf.aspx?ext=.pdf [https://perma.cc/LZV5-FSMH].

Peanuts: 55%. *See* NAT'L PEANUT BD., ANNUAL REPORT 4 (2015), <http://nationalpeanutboard.org/content/1126/files/FY%2015%20Annual%20Report%20Final.pdf> [https://perma.cc/SMK7-XB4G]. Pork: 68%. *See* NAT'L PORK BD., ANNUAL REPORT 34 (2015), <http://www.pork.org/wp-content/uploads/2016/02/2015-npb-annual-report.pdf> [https://perma.cc/K29Y-ZL2E].

Raspberry (budgeted): 60%. *See* NAT'L PROCESSED RASPBERRY COUNCIL, APPROVED BUDGET 1–2 (2016), <http://www.redrazz.org/wp-content/uploads/2016/03/FY-2016-Approved-Budget-Detail-May-19-2015.pdf> [https://perma.cc/489M-PRJD1].

Watermelon: 35%. *See* NAT'L WATERMELON PROMOTION BD., ANNUAL REPORT 3 (2015) <http://www.watermelon.org/assets/IndustryMembers/2014-2015AnnualReport-FINAL.pdf> [https://perma.cc/8GBD-FLVA].

Paper and Packaging: 80.96%. *See* PAPER AND PACKAGING BD., ANNUAL REPORT 9 (2015), https://s3-us-west-2.amazonaws.com/paperandpackagingboard/PDFs/PPB_AR2015_DIGITAL_042916.pdf [https://perma.cc/EVH5-Q3EZ].

¹⁶⁷82 Fed. Reg. 5746 at 5766.

¹⁶⁸*Id.*

¹⁶⁹*Id.*

¹⁷⁰*Id.*

¹⁷¹*Id.*

¹⁷²*Id.*

¹⁷³*Id.* at 5757.

¹⁷⁴*Id.* at 5766.

Despite these indications that the proposed program would focus on research and sector information to increase supply, rather than promotion to increase demand, indications of a potential promotion emphasis emerge with more scrutiny. For example, when discussing the information category, the Notice reveals the fine line between promotion and information expenditures. As an example of an informational goal, the proposal cites continuing consumer confusion between “organic,” “natural,” and “local” products.¹⁷⁵ “[T]he industry must continually invest in educating consumers on the meaning of the USDA organic label.”¹⁷⁶ Yet, the proposal does not address how such consumer education efforts would be distinct from “promotion.”¹⁷⁷ Further, the unrestricted half of the research quarter could be spent on marketing research, presumably, freeing up more of the promotion quarter for the kinds of advertising common to AMS-administered programs. Finally, nothing prevents another 10 percent or more of the discretionary quarter from being spent entirely on promotion, since administrative expenses of the program (presumably allocated to the discretionary budget) are limited to 15 percent, leaving 10 percent or more to allocate at will. Thus, despite some attempts to emphasize the research aspects of the proposed organic checkoff program, it still has the potential to revert to a classic AMS-administered advertising program. Considering the organic sector operates in a supply-strapped environment, increased public promotion seems like a questionable use of industry resources.

USDA must approve all plans and projects paid from the assessments.¹⁷⁸ This satisfies one of the requirements articulated in *Livestock Marketing* for the program’s advertising to be deemed “government speech,” not commercial speech that would carry free speech protection for the industry funders.¹⁷⁹ The group that would develop those expenditure choices would be the Organic Research and Promotion Board, discussed next.

C. Board

Livestock Marketing requires USDA to control the checkoff board for a checkoff program to maintain government speech treatment.¹⁸⁰ To accomplish this, the organic proposal calls for the Secretary of Agriculture to appoint all 17 board members, from industry-nominated individuals.¹⁸¹ The board would be comprised of eight producer representatives, seven handler representatives, one importer representative and one at-large, non-voting member.¹⁸² Five producer seats would be distributed among five

¹⁷⁵*Id.* at 5757.

¹⁷⁶*Id.*

¹⁷⁷*See id.* This same blurry line between “promotion” and “consumer information” is reflected in the Beef Act, which defines consumer information as any “nutritional data and other information that will assist consumers and other persons in making evaluations and decisions regarding the *purchasing*, preparing and use of beef and beef products.” 7 U.S.C. § 2902(6) (2016) (emphasis added). Further, one of the 2016 Consumer Information highlights of the beef checkoff was characterized as a grilling “promotion.” *See* CATTLEMEN’S BEEF BD., ANNUAL REPORT 10 (2016), [http://2016annualreport.beefboard.org](https://2016annualreport.beefboard.org) [<https://perma.cc/29M6-K24T?type=image> 2].

¹⁷⁸82 Fed. Reg. 5746 at 5773.

¹⁷⁹*See Livestock Marketing*, 544 U.S. at 580.

¹⁸⁰*Id.*

¹⁸¹82 Fed. Reg. 5746 at 5750.

¹⁸²*Id.* at 5761.

geographic regions with roughly equal organic production.¹⁸³ Two producer seats would be allocated to one region that includes California and represents almost double the organic production of each other region.¹⁸⁴ Integrated organic producer-handler-importers could seek nomination to the board under any role for which they are certified.¹⁸⁵ One seat would be set aside for a voluntarily assessed participant, but voluntarily assessed participants can be nominated and appointed to any of the other seats for which they qualify, such as their regional seat.¹⁸⁶

The nomination process would be facilitated by OTA, using meetings, mailings, trade press, and assistance from USDA to solicit nominations.¹⁸⁷ For the initial board, all nominations would be handled by USDA and forwarded to the Secretary of Agriculture for appointment.¹⁸⁸ For subsequent boards and nominations, the proposal anticipates multiple nominees for each seat, who would then be voted on by participants in the same group represented, whether that be producers in a region, or handlers, importers or voluntarily assessed participants.¹⁸⁹ The top two vote-getters would be forwarded to the Secretary for appointment between them.¹⁹⁰

A nominee can only represent the region where he/she is domiciled, but producers who operate in multiple regions can vote in all those regions. Similarly, integrated organic producer-handler-importers can vote for nominees in all those roles. Thus, geographically larger operations and vertically-integrated operations would have a greater share of votes in the board nomination process,¹⁹¹ again supporting complaints that the proposal favors larger organic operations. No two board members can be employed by the same organization, however.¹⁹²

D. Comparative Advertising and Disparagement

As explained above, the proposed organic board and all its activities would be under the authority of USDA, through AMS. As such, these government authorities can restrict the advertising messages of the board without any implications to free speech rights of the organic participants who pay for the “government speech.”¹⁹³

Under the proposal, the organic board would be prohibited from engaging in any “promotion that is false, misleading or disparaging to another agricultural commodity.”¹⁹⁴ AMS imposes this restriction on all its commodity-specific checkoff

¹⁸³*Id.* at 5762–63.

¹⁸⁴*Id.*

¹⁸⁵*Id.* at 5764.

¹⁸⁶*Id.* at 5763. Once every five years, the geographic distribution of organic production must be analyzed by the board to determine if regional distribution of board seats needs to be adjusted. *Id.* Similarly, the number of voluntarily assessed participants in the program needs to be analyzed to determine if the board size or apportionment needs to be adjusted to alter their representation on the board. *Id.*

¹⁸⁷*Id.* at 5764.

¹⁸⁸*Id.*

¹⁸⁹*Id.*

¹⁹⁰*Id.*

¹⁹¹*Id.* at 5773. The proposed referendum voting process is “one entity, one vote.” *See supra* note 150.

¹⁹²*Id.* at 5783.

¹⁹³*See Livestock Marketing*, 544 U.S. at 581.

¹⁹⁴82 Fed. Reg. 5746 at 5784.

programs.¹⁹⁵ AMS Guidelines define disparaging ads as those “that depict other commodities in a negative or unpleasant light.”¹⁹⁶ At the same time, “[c]omparative advertising (advertising that compares facts about different commodities or products) will be allowed,”¹⁹⁷ even if it depicts other products in a negative light, presumably.

Presumably, organic agriculture promotions would want to include comparison statements of what organic production is *not*: no chemical pesticides or herbicides; no antibiotics or added hormones in livestock; no genetically modified seeds. In other words, organics usually would promote that it eschews methods and ingredients commonly done and used in mainstream, commercial agriculture. The AMS guidelines seem to allow this kind of direct, factual comparisons between organic and non-organic approaches.

At the same time, however, the AMS guidelines likely prohibit (as disparaging) any commentary or other suggestion that those differences implicate consumer health, animal welfare, or the environment. As one opposing commenter stated, “The farmers who have dedicated their lives to organic production with integrity, cannot promote the fundamental integrity of their work if they cannot express the merits of organic production compared to chemical agriculture.”¹⁹⁸ Those merits include alleged implications to health, animal welfare, and environment that are at the heart of organic product differentiation and are the reasons consumers are willing to pay premium prices for organics.¹⁹⁹ “Where producers are successful in differentiating a product under a marketing order program, an advertising and promotion effort may achieve its greatest success.”²⁰⁰ Nevertheless, AMS guidelines likely prohibit any such messaging as disparaging to non-organic production and products. Accordingly, organic promotions could end up limited to a list of ‘Nos’ (No GMO, No Chemicals, No Antibiotics) without any ability to articulate why those ‘Nos’ should matter to

¹⁹⁵U.S. DEP’T AGRIC., *Guidelines for AMS Oversight of Commodity Research and Promotion Programs* 13 (2012) [hereinafter USDA Guidelines]. False and misleading advertising never enjoys free speech protection. *Central Hudson*, *supra* note 48.

¹⁹⁶USDA Guidelines, *supra* note 195, at 13. This AMS definition lacks a classic factor found in disparagement case law, namely a false statement of fact. *See generally*, Rita Marie Cain, *Food, Inglorious Food: Food Safety, Food Libel, and Free Speech*, 49 AM. BUS. L. J. 275 (2012). Because disparagement case law is founded in free speech principles, however, AMS-administered advertising programs that are “government speech” do not have to follow those cases’ concepts. *See Livestock Marketing*, *supra* notes 75 through 80 and accompanying text.

¹⁹⁷USDA Guidelines, *supra* note 195, at 13.

¹⁹⁸Rebecca Weed, Comment Letter on Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Mar. 3, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-2404> [<https://perma.cc/5EE2-AQY3>]. *But see* John Brunnquell, Comment Letter on Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Mar. 20, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-3016> [<https://perma.cc/Y4QM-TWQR>], who supports the proposal because it will help “resolve over a decade of consumer confusion around the USDA Organic label’s animal welfare requirements, particularly for egg-laying hens.” For a complete discussion on the animal welfare issues in the egg industry, *see* Rita-Marie Cain Reid, *The Chicken and the Egg—Animal Welfare, Food Safety and Federalism*, 71 FOOD & DRUG L. J. 1 (2016).

¹⁹⁹*See supra* note 35 and accompanying text.

²⁰⁰G. Burton. Wood, *Marketing Agreements and Orders – Without Production Controls*, FARM FOUND. INCREASING UNDERSTANDING PUB. PROBS. & POL’Y 69, 70 (1961).

consumers.²⁰¹ Organic “promotion” would be little more than labeling, which is already available through certification.

If such a regulatory approach were not potentially limiting enough, the greater unknown with any organic promotion regulation is whether the U.S. or state governments are going to impose qualifying messages like FDA recommended for organic milk from hormone-free cows.²⁰² If organics effectively must qualify their ‘Nos’ with “Not that there’s anything wrong with that,” then organic promotion becomes pointless. If organic advertising must carry an FDA-type caveat that chemical- and antibiotic-laden food is no different for consumers, animals, or the environment, then why bother to advertise organics? Why not save the collective promotion dollars in a government-speech advertising program, and let organic operators spend those fees on private speech that says what they actually want to say: mainstream, commercial agriculture damages humans, farm animals, water, soil, and air.²⁰³

III. RECOMMENDATIONS & FUTURE RESEARCH

For the reasons discussed herein, and articulated by opponents in the public comment period, USDA should terminate the rulemaking process for any organic promotion system. An industry-funded government speech program does not serve organic producers, who need the freedom to advertise their view of commercial agriculture and the problems it causes to the environment, animal welfare and consumer health.

If USDA (at the urging of OTA) persists in creating an organics marketing program, this section recommends alternative approaches to the current proposal.

²⁰¹Multiple opponents to the proposal complained that a checkoff promotion would likely prohibit a statement such as “Organic is the Gold Standard.” See, e.g., Jorge Tamargo, Comment Letter on Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Jan. 25, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-0610> [https://perma.cc/3UTK-LLEQ]. This complaint is one of several articulated by the No Organics Checkoff coalition. The coalition provides a web link for submitting comments in the rulemaking, including their summary of grounds for opposition, such as the “Gold Standard” complaint about advertising. See NO ORGANIC CHECK OFF, <http://noorganiccheckoff.com/> [https://perma.cc/UN22-GD7A] (last visited Mar. 7, 2017). The list of twenty-seven members of the No Organics Checkoff coalition can be found at the Cornucopia Institute website. *Organic Checkoff Program Proposed by USDA to the Dismay of Farmers*, CORNUCOPIA INST., <https://www.cornucopia.org/2017/01/organic-checkoff-proposed-usda-dismay-farmers/> [https://perma.cc/K9LS-RF36] (last visited Jan. 17, 2017).

²⁰²See *supra* notes 82 through 101 and accompanying text.

²⁰³See, e.g., Kristin Wartman, *Food Fight: The Politics of the Food Industry*, NEW LABOR FORUM 75–76 (Aug. 20, 2012) (“The environmental consequences of industrial agriculture negatively impact our health in multiple ways. Beyond the poisoning of the environment, the foods that are produced in the industrial system are far less healthy than those produced organically or on a smaller scale. . . . Industrial food products that are highly processed and altered have been linked in hundreds of studies to obesity, chronic diseases, and a host of other health concerns.”); but see Ray Rowley, Comment Letter on Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Feb. 23, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-2247> [https://perma.cc/FY2Q-KJZH] (“The organic growers are using speech that is degrading, defamatory and just plain inaccurate to described conventionally grown produce. . . . Organics seem to be the ‘Cinderella Child’ and seems to be able to disparage any conventionally grown product with no consequences. If AMS allows this market order, then it seems to give them USDA authority to continue to disparage conventionally grown crops competing in the same market.”). Rowley is a conventional farmer who opposes the organic checkoff as a potential government attack on conventional farming. *Id.*

A. Local Marketing Orders or Agreements

A marketing order or agreement might be better suited to the needs of the organic market to increase supply. Traditionally, marketing agreements were intended to stabilize price in a region and a commodity “by exerting some influence over the supply of, and the demand for, the commodity offered for market.”²⁰⁴ In an industry like organics, where entry barriers are high, the potential for price stability would be a strong incentive for farmers to transition acreage to organic production. “[M]arketing agreements and orders have one major purpose - to improve the market power of producers. In most cases the objective is to stabilize marketing conditions, which will improve producers’ income.”²⁰⁵ Marketing agreements and orders help both producers and handlers by easing uncertainty, reducing transaction costs and improving access to credit by lowering inherent industry risk about supply and demand.²⁰⁶ All these stabilizing forces could improve organic supply.

Unfortunately, the 2014 Farm Act that underpins the current OTA/USDA organic marketing proposal only amended the 1996 Commodity Research and Promotion law,²⁰⁷ not the 1937 Agricultural Marketing Agreement Act. Without this express authorization in 2014, both original enabling laws limited USDA-administered marketing to commodity-specific orders, agreements and promotion programs. A program that applies to all organic products was not an option under either of the original enabling laws.

USDA could lobby for revision to the 1937 AMAA to be able to craft an organic marketing order or agreement. That is unlikely, however, since USDA already has committed to organic promotion via the checkoff statute. Further, Congress is unlikely to provide the necessary organic revision to the 1937 law, considering how vast the corresponding antitrust exemption would be for organics. Antitrust exemptions under the AMAA are defensible because they are limited to individual commodities and to geographic regions, neither of which restrictions would apply to an organics marketing agreement or order. Further, price stabilization for a particular commodity may seem more important to the general food supply than the same price fixing for organics. Since USDA does not take a position on the superiority of organics for health (human or animal) or the environment,²⁰⁸ organics may always be seen as a luxury, not warranting an industry-wide antitrust exemption.²⁰⁹

²⁰⁴Wood, *supra* note 200, at 70. The ability to affect price through manipulation of supply, as well as through price maintenance agreements, is why marketing agreements and orders carry antitrust exemptions.

²⁰⁵*Id.*

²⁰⁶JOHN D. REILLY, U.S. DEP’T OF AGRICULTURE, COOPERATIVE MARKETING AGREEMENTS: LEGAL ASPECTS, ACS RESEARCH REPORT 106, 2–3 (1992).

²⁰⁷7 U.S.C. § 7401(f)(2) (2017).

²⁰⁸*See* Glickman, *supra* note 27.

²⁰⁹One opponent to the organic proposal, an organic farmer since 1987, may appreciate the economics of the organics market, but not the antitrust issues, protected by marketing orders and agreements but not by CHECKOFF programs: “[I]f we farmers would just band together to determine an adequate supply to meet the market rather than trying to produce more in the face of lack of demand we would not need to be convinced that we need a check-off tax to sell, promote, and build more markets.” Ronald Ackerman, Comment Letter on Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Jan. 23, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-0502> [<https://perma.cc/VH2M-GJUG>].

As discussed next, however, revisions to the proposed organic checkoff program could adopt some of the best features of the marketing order scheme to help address the market constraints that the current proposal does not effectuate.

B. Revisions to the Checkoff Proposal

If USDA continues to pursue a national checkoff program, a number of revisions would improve the proposal, based on the analysis above.

1. Additional Regions and More Regional Control over Assessment Dollars

Although checkoff programs must be national in scope,²¹⁰ that does not mean the organics proposal cannot be structured to achieve some of the advantages of regional marketing orders and agreements. The current proposal recognizes the value of localized marketing programs when it expressly permits state checkoff programs to continue²¹¹ and provides an assessment credit for participants in such programs (only up to 25 percent, however).²¹² The information allocation of the proposal also expressly includes research regarding local marketing opportunities.²¹³ Further, the proposal recognizes consumers already associate organic with local production, (although mistakenly in some cases).²¹⁴ “Local is the new organic” according to studies showing that the price premium for local produce can be greater than for organic.²¹⁵

A local approach could be accomplished by establishing more, smaller sub-regions within the six geographic board regions proposed. These smaller regions could be built around local markets and distribution channels, relying on systems that already exist for small farms. For example, “Buy Fresh. Buy Local” is a marketing campaign sponsored by FoodRoutes Network of Pennsylvania, with 26 chapters in 18 states.²¹⁶ FoodRoutes Network provides some of the same services as a checkoff program: “communications tools, technical support, networking and information resources.”²¹⁷ Another example is the Good Natured Family Farms, a cooperative of

²¹⁰ See *supra* notes 18 through 21 and accompanying text.

²¹¹ 82 Fed. Reg. at 5748.

²¹² *Id.* at 5772. The California Table Grape Commission urges that the credit for participation in a state promotion program be revised to 100%. California Table Grape Commission, Comment Letter on Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Mar. 19, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-2998> [<https://perma.cc/W4NH-DY8B>]. As the comments point out, dual covered commodities, discussed *supra* notes 152 through 159 and accompanying text, get a 100% credit to avoid assessment by more than one *federal* promotion program on the same sale. *Id.* at 3. The comments explain that 99% of table grapes are grown in California and its state assessment applies to all state sales. *Id.* at 2. Accordingly, almost all U.S. organic table grape sales would be assessed 1.75 times if the USDA proposal is not revised to expand the state credit to 100%, the same as the credit for federal dual covered commodities.

²¹³ 82 Fed. Reg. at 5760.

²¹⁴ *Id.* at 5757.

²¹⁵ Veldstra et al., *supra* note 29, at 429.

²¹⁶ *Our Mission*, FOODROUTES NETWORK, <http://foodroutes.org/> [<https://perma.cc/TM5H-83JU>] (last visited Feb. 18, 2017). The Chapter Directory is found at <http://foodroutes.org/buy-fresh-buy-local-program/chapter-directory/> [<https://perma.cc/W67Q-DJKC>].

²¹⁷ *Our Mission*, FOODROUTES NETWORK, <http://foodroutes.org/> [<https://perma.cc/TM5H-83JU>] (last visited Feb. 18, 2017).

approximately 100 Kansas and Missouri family farms that sell to grocers and restaurants through SYSCO.²¹⁸ The co-op members conform to the “Buy Fresh Buy Local” production standards.²¹⁹ These local distribution programs capitalize on what the federal law of marketing orders and agreements have always reflected: food markets are segmented by region and different segments require different marketing approaches.²²⁰ If good existing, local distribution methods were combined with the national research capabilities of the proposed checkoff program, organic producers could thrive in their natural geographic markets.

Of course, a larger checkoff program board with many more regional representatives could be unworkable. Accordingly, the decentralization recommended here could be accomplished by establishing local “subcommittees” within the board regions established under the proposal. Key, however, would be a requirement that a majority of promotion and information expenditures be allocated through the regional board representatives to their smaller, local subcommittees for those particular local marketing needs. This leads to the next, critical recommendation for revising the existing proposal.

2. Tightened Expenditures Focusing on Organic Supply and De-emphasizing Generic Advertising.

If organic marketing will be constrained from fully contrasting between organics and modern commercial agriculture,²²¹ then the promotion dollars in such a program would be better spent on research and other supports to help parties transition to organic production. One research objective could be industry research into entry barriers other than the known three-year transition period. Assessments could fund grants, low-interest loans, and other financial tools that could help ease supply shortages by encouraging more acreage transition to organics, even though price premiums would not be immediately available.²²² A majority of promotion dollars should be allocated to improving local distribution co-ops like those discussed above (tapping into any “local” price premium potential). All these potential uses of funds would improve the market for many organic operations in ways that national generic advertising would not.

²¹⁸*Nature's Best from Local Family Farms*, GOOD NATURED FAMILY FARMS, http://www.goodnaturedfamilyfarms.com/Home_Page.html [<https://perma.cc/S9CM-96WW>] (last visited Feb. 18, 2017). SYSCO is a global food distributor that focuses on institutional food service providers. *The Sysco Story*, SYSCO, <http://www.sysco.com/about-sysco.html> [<https://perma.cc/ZKC3-4TGS>] (last visited Feb. 18, 2017).

²¹⁹*Producers and Products*, GOOD NATURED FAMILY FARMS, http://www.goodnaturedfamilyfarms.com/Producers_Products.html [<https://perma.cc/RX7Y-8LD2>] (last visited Feb. 18, 2017).

²²⁰See generally Gary F. Fairchild, *Marketing Orders and Market Segmentation: Matching Product Characteristics to Consumer Preferences*, 20 J. FOOD DISTRIBUTION RES. 21 (1989).

²²¹See *supra* notes 192 through 201 and accompanying text.

²²²Qayyum Johnson, Comment Letter on Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Jan. 26, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-0704> [<https://perma.cc/4M25-JR5J>] (“Organic ought to be supported through basic methods like land access, student debt relief, farmer/rancher training, access to no-interest loans; NOT a check-off program”); Mark Wilkes, Comment Letter on Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Feb. 2, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-1337> [<https://perma.cc/3JJ7-KF86>] (“i [sic] would be in favor of a lobbying [sic] effort that would support better insurance for organic farmers.”).

3. *Permit All Organic Certificate Holders to Vote on the Referendum, Without Opting in*

This recommendation allows small operations to still claim their *de minimis* exemptions, although they would also lose any right to participate on the board if the referendum passes. This will avoid the pro-passage skewing inherent in the current proposal.²²³ The referendum would be most representative of all certified organic participants if passage required a majority vote of all certificate holders, rather than just a majority of all voters. Then opting out would be the same as a No vote.

4. *Eliminate Dual-Covered Commodity Treatment for Small Operations*

If an operation qualifies for the *de minimis* organic exemption, it should not be forced to pay one or the other of the organic assessment or the commodity-specific assessment.²²⁴ The rationale for a *de minimis* exemption does not change based on the commodity an operation produces. Small organic producers in the 22 commodities with checkoff programs should not be disadvantaged over their fellow small organic operators in every other commodity or product. Dual-covered operations that do not qualify for the *de minimis* exemption should be allowed to opt into either the organic or commodity checkoff program, as proposed.

5. *Make Assessments More Progressive*

To prevent the checkoff program from operating as a further barrier to organic growth, the assessment rate should be lower for those with smaller revenues (although above *de minimis*). Unlike operations covered by commodity-specific programs that all share common market dynamics for their shared product, organic operations covered by this proposal will be operating in widely different markets. A flat rate on such diverse operations may be simple, but otherwise makes no sense. Larger operations should pay a higher portion of the organic assessment, like the U.S. income tax system and like OTA's own membership fee structure.²²⁵ Finance and accounting research could help determine the appropriate rates, especially at the level just above the *de minimis* exemption.

C. *Future Research*

In 2016, Congress passed the National Bioengineered Food Disclosure Standard regarding presence or lack of genetically-modified organisms (GMOs) in food.²²⁶ The law expressly preempts all state GMO labeling laws.²²⁷ Under this new federal standard, GMO labeling regulations shall not treat GMOs "as safer than, or not as safe as," a non-GMO counterpart, solely because of the use of GMOs.²²⁸ Organic

²²³ See *supra* notes 138 through 151 and accompanying text.

²²⁴ See *supra* notes 138 through 159 and accompanying text.

²²⁵ *Cost of Membership*, ORGANIC TRADE ASS'N, <https://www.ota.com/membership/become-member/cost-membership> [<https://perma.cc/8HUB-KL2Z>] (last visited Mar. 8, 2017).

²²⁶ Pub. Law. 114-216, § 1, July 29, 2016, 130 Stat. 834.

²²⁷ 7 U.S.C. § 1639b (e) and 7 U.S.C. § 1639i (b).

²²⁸ 7 U.S.C. § 1639b (b)(3).

certification is established as sufficient (though not exclusive) to claim a food is “non-GMO.”²²⁹ Regulations under the Act are still forthcoming, but these statutory mandates seem to set up the next round of disputes between food regulators and organic marketers regarding free speech rights to differentiate organic products.

CONCLUSION

More than 15,000 comments were filed in the rulemaking docket on this proposal, most in favor. The vast majority of comments both in favor of and against the proposal were substantially cut and pasted from the OTA sample comments or sample comments of opponents such as Cornucopia Inc. Most academic commenters were from agriculture programs who favored the new research dollars that might flow to their programs.

By contrast, Jennifer Fike is a commenter with no personal financial stake or organic industry ties. Yet she is someone who understands local and organic farming well. This former Michigan Commissioner of Agriculture and Rural Development once directed the Food System Economic Partnership, a nonprofit whose mission is agricultural development opportunities, sustainable communities, and healthy local economies. She was on the original steering committee for the Tilian Farm Development Center, which focuses on removing barriers that aspiring farmers confront, such as access to land, resources, equipment, and education. Presumably her business administration degree from the University of Michigan also gives her a good understanding of marketing.²³⁰ When a citizen like Fike, with no personal financial stake or organic industry ties, advocates against the organic checkoff program,²³¹ that is a worrying signal that the program is flawed. Hopefully, USDA will give strong weight to such a voice in the rulemaking proceeding and abandon this proposal. If not, the final rule needs to incorporate numerous revisions, such as those recommended here, to avoid a costly decision for the health of organic food production.

²²⁹7 U.S.C. § 6524.

²³⁰See Jennifer Fike, NAT'L WILDLIFE FED'N, <https://www.nwf.org/News-and-Magazines/Media-Center/Faces-of-NWF/Jennifer-Fike.aspx> [<https://perma.cc/A9CF-MWF7>] (last visited Mar. 8, 2017).

²³¹Jennifer Fike, Comment Letter on Agricultural Marketing Service (AMS) Proposed Rule: Organic Research, Promotion, and Information Order; Referendum Procedures (Feb. 9, 2017), <https://www.regulations.gov/document?D=AMS-SC-16-0112-1753> [<https://perma.cc/HE3W-PQZ7>].