

*Fighting for the U.S. Cattle Producer!*



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*USA*

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December 10, 2014

Beef Promotion, Research, and Information  
Order; Research and Promotion Division  
Livestock, Poultry, and Seed Program  
Agricultural Marketing Service  
USDA, Room 2096-S, STOP 0249  
1400 Independence Avenue SW.  
Washington, DC 20250-0249

Via E-Mail: [www.regulations.gov](http://www.regulations.gov)

**Re: R-CALF USA Comments in Docket No. AMS-LPS-14-0081: Notice of Inquiry; Request for Comments on a New Beef Promotion, Research, and Information Order**

Dear Sir or Madam:

The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF USA) appreciates this opportunity to submit comments to the U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) regarding Docket No. AMS-LPS-14-0081: *Notice of Inquiry; Request for Comments on a New Beef Promotion, Research, and Information Order* (hereafter "Notice"), published at 79 Fed. Reg., at 66,684-66,686 (Nov. 10, 2014).

R-CALF USA is a non-profit association that represents thousands of independent U.S. cattle farmers and ranchers in approximately 40 states. It is the largest producer-only trade association representing the U.S. cattle industry. R-CALF USA works to sustain the profitability and viability of the U.S. cattle industry, a vital component of U.S. agriculture. R-CALF USA's membership consists primarily of independent cow-calf operators, cattle backgrounders and feedlot owners. Various main street businesses are associate members of R-CALF USA.

## **I. INTRODUCTION**

For many years, R-CALF USA and its state affiliates have vigorously urged the Secretary of Agriculture (Secretary) to put an end to the conflicts of interest, corruption, and abuses that are manifest in the current Beef Checkoff Program. Concerns of such improprieties escalated when, in 2010, an independent compliance review by the Clifton-Gunderson accounting firm revealed that the National Cattlemen's Beef Association (NCBA) had misappropriated \$216,944

in producer-paid assessments.<sup>1</sup> The executive summary of that compliance report unequivocally states:

In addition, the nature of several of the exceptions and undetermined items reported by CG [Clifton Gunderson] **clearly indicates that NCBA breached the financial firewall during the periods tested** and that NCBA did not maintain sufficient documentation in many instances to adequately support the separation of expenditures between the policy side of NCBA and the checkoff side of NCBA. Although not reported as such by CG, CBB (the Cattlemen’s Beef Board] considers this lack of sufficient documentation to be noncompliance (emphasis added).<sup>2</sup>

This revelation is truly alarming because the NCBA has controlled the Beef Checkoff Program since its inception, for 23 years prior to the testing period of the compliance review and now for 4 additional years after the testing period, and the independent compliance review’s findings of significant malfeasance were based on only a small fraction of transactions that had occurred during a period of less than two and one-half years.

Based on this documented malfeasance, and because the U.S. Supreme Court had determined that the Beef Checkoff Program funds government speech, which is a post-statutory determination that suggests the current Beef Checkoff Program’s mandatory assessments are, as a matter of law, mandatory taxes, the Secretary most certainly has the authority to permanently suspend the NCBA as a Beef Checkoff Program contractor as well as to take decisive steps to end the ongoing conflicts of interest inherent to the present structure of the program, particularly regarding the structure and involvement of the Federation of State Beef Councils that is owned, controlled and housed under the NCBA and whose members are purportedly required to sign a loyalty oath to the NCBA.<sup>3</sup>

Unfortunately, the Secretary remains unpersuaded by R-CALF USA’s persistent requests to reform the manifestly corrupt Beef Checkoff Program and, instead, has chosen a very indirect and circuitous route with which to intervene. The Secretary’s motive and prospects for success remain unclear.

The Secretary’s chosen path appears premised on the erroneous view that the 1985 enabling statute for the current Beef Checkoff Program, which is a stand-alone statute, is so

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<sup>1</sup> Agricultural Marketing Service Oversight of the Beef Promotion and Research Board’s Activities, USDA Office of Inspector General (OIG), Audit Report 01099-0001-21 (January 2014), at 4 (note that this is a re-issued report in which the OIG recants its previous conclusion that checkoff funds had been properly expended.), attached hereto as Exhibit 1.

<sup>2</sup> Cattlemen’s Beef Board Executive Summary of Report of Agreed-Upon Procedures for the National Cattlemen’s Beef Association Contract Compliance FY 2008, FY 2009 and the Five Months Ended February 28, 2010, at 4 of 12, attached hereto as Exhibit 2.

<sup>3</sup> Board of Directors Conflict of Interest Policy, NCBA, April, 21, 2008 (Anecdotal evidence reveals that Federation Members are required to sign this loyalty oath to the NCBA. Also, to the extent that NCBA Officers and Directors charge expenses to the Beef Checkoff Program to carry out various activities, they are clearly conflicted.), attached hereto as Exhibit 3.

prescriptive that it thwarts even a presidential cabinet member from initiating critically needed reforms. As discussed more fully below, R-CALF USA disagrees completely with this viewpoint. Regardless, however, the Secretary's chosen path is not without precedent.

Anecdotal evidence indicates that when AMS faced producer discontent with the national Honey Checkoff, the AMS worked with Congress to replace the 1987 Honey Checkoff Program that was, like the Beef Checkoff Program, enacted by stand-alone legislation with a new, more favorable program under the same 1996 Generic Checkoff Act that the Secretary now intends to use to establish a new beef checkoff program. The AMS developed and implemented the new, producer-favored honey checkoff program in 2008 while the existing checkoff program remained in effect. Then, after a referendum was held and producers voted to retain the new Honey Checkoff, the old checkoff program was terminated.

Theoretically, at least, this same strategy could work to finally put an end to the intolerable corruption inherent in the current Beef Checkoff Program. But, it represents a highly circuitous route fraught with uncertainty and an intolerable timeframe. It appears the Secretary plans to complete the necessary rulemaking and referendum to establish a new beef checkoff program under the 1996 Generic Checkoff Act while the existing Beef Checkoff Program under the 1985 Act remains in effect. Provided cattle producers would vote in the referendum to keep the new checkoff program, the AMS could then work with Congress two to three years from now to simultaneously terminate the old Beef Checkoff Program and implement the new beef checkoff program. The prospects for success for this strategy likely will diminish over time, particularly since this Administration will not likely be in office at the time the Secretary is proposing to initiate steps to terminate the current Beef Checkoff Program.

If the immediate termination, or at least the immediate suspension of the current Beef Checkoff Program is an integral part of the Secretary's plan, thereby eliminating the doubling-up of producer assessments and ending the ongoing conflicts of interest, abuses, corruption, inefficiencies and wastefulness pervading the program, then R-CALF USA intends to assist the Secretary in the development of a new beef checkoff program that would be free from the conflicts of interest, corruption, abuses, inefficiencies and wastefulness that have rendered the current Beef Checkoff Program unsalvageable.

If, on the other hand, the Secretary intends to allow the NCBA to continue receiving tens of millions of checkoff dollars from the \$1 per head assessment that producers are now required to pay under the current 1985 Act for the next three years or so and then, on top of that, impose yet another assessment on producers of yet another \$1 or so that would also remain in effect for the next three years or so, R-CALF USA will vigorously oppose that portion of the plan that calls for no action to be taken by the Secretary to redress the intolerable circumstances associated with the current Beef Checkoff Program.

## **II. RESPONSES TO THE BACKGROUND SECTION OF THE NOTICE**

### **A. Recent Events Suggest the Notice Is Wrong to Assume that Support for the Current, 1985 Beef Checkoff Program Is High.**

The Notice asserts that support for the 1985 Beef Checkoff Program is high based on producer attitude surveys.<sup>4</sup> However, recent events suggest that just the opposite is true and that only a handful of NCBA-supporters continue supporting the current, NCBA-controlled Beef Checkoff Program.

On Oct. 13, 2014, the NCBA created a petition on the White House website, *We the People*. The petition was titled “Don’t Hijack the Beef Checkoff” and NCBA prominently displayed the Internet link to the petition on the front page of its own website. The NCBA’s goal was to obtain 100,000 petitioners by Nov. 12, 2014 that shared NCBA’s opposition to the Secretary’s plan to create a new checkoff under the 1996 act on the grounds that it would “diminish the currently successful program.”<sup>5</sup> This goal of 100,000 petitioners, had it been achieved, would represent less than 14 percent of the 729,000 beef cattle operations USDA recognizes in the United States,<sup>6</sup> most or all of which, if not all, would be payees to the current Beef Checkoff Program. But, NCBA’s petition failed miserably. Within just days before the Nov. 12, 2014 deadline, the NCBA was not able to muster even 1,000 petitioners and sometime on or before Nov. 12, 2014, the failed petition was removed completely from the White House’s website.<sup>7</sup>

This failure is telling. NCBA was only able to obtain signatures from about 0.1 percent of the nation’s cattle producers. Further, NCBA claims a membership of 29,000 and yet it could not convince even 4 percent of its own members to sign their life-saving petition.<sup>8</sup>

Also noteworthy is the fact that after spending the past 14 years trying to convince the Secretary and his predecessors to take decisive steps to put an end to the corruption, abuses and conflicts of interest pervasive within the current Beef Checkoff Program, the membership of the nation’s largest producer-only cattle industry trade association – R-CALF USA – voted in 2014, by a margin of 89 percent, to urge Congress to repeal the current Beef Checkoff Program on the grounds that the program is fraught with corruption and abuses. Importantly, for the previous 14 years R-CALF USA members tried to salvage the current Beef Checkoff Program, but now, after years of inept governmental oversight and indecision, they overwhelmingly demonstrated through a clear vote of no confidence that the current program is unsalvageable.

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<sup>4</sup> 79 Fed. Reg., at 66,685, col. 2.

<sup>5</sup> We the People: Your Voice In Our Government, We Petition the Obama Administration to: Don’t Hijack the Beef Checkoff, Nov. 4, 2014, attached hereto as Exhibit 4.

<sup>6</sup> Farms, Land in Farms, and Livestock Operations, 2012 Summary, USDA National Agricultural Statistics Service, February 2013, at 18, available at <http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2010s/2013/FarmLandIn-02-19-2013.pdf>.

<sup>7</sup> We the People: Your Voice In Our Government, We Petition the Obama Administration to: Don’t Hijack the Beef Checkoff, Nov. 4, 2014 (with less than 1,000 petitioners), attached hereto as Exhibit 4; *see also*, Livestock: USDA Seeks Comments for New Beef Checkoff – DTN, Chris Clayton, AgFax.com, Nov. 7, 2014 (stating there were fewer than 1,000 signatures on the petition), available at <http://agfax.com/2014/11/07/livestock-usda-seeks-comments-new-beef-checkoff-dtn/>.

<sup>8</sup> NCBA Membership, Member Benefits, National Cattlemen’s Beef Association (stating it has 14 lobbying staff and 29,000 NCBA members), available at <http://www.beefusa.org/ncbamembership.aspx>.

The foregoing events strongly suggest that the surveys that purport to demonstrate a high-level of support for the current Beef Checkoff Program are inaccurate and misleading. Therefore, the Secretary should not assume a high-level of support for the current program until and unless the Secretary conducts a completely independent survey from a statistically significant pool of producers that is not disproportionately weighted with NCBA members.<sup>9</sup>

**B. There Is No Evidence to Support the Notice’s Contention that Most Producers Support an Increase in the Assessment Rate of the Current Beef Checkoff Program.**

The Notice inexplicably asserts, without any substantiating evidence, that “most” producers support an increase to the assessment rate for the current Beef Checkoff Program.<sup>10</sup> Where did this come from?

If the Notice construes recent state-wide checkoff referendums as support for its otherwise baseless contentions, then the Notice is misleading the public. This is because: 1) Successful referendums that increased state-wide assessments to be collected and retained by state beef councils cannot be equated to support for an increase to the national Beef Checkoff Program because the control of state-collected assessments is local, *i.e.*, control of the funds is vested within the state, rather than national as is the case with the national Beef Checkoff Program. 2) Only a small fraction of producers eligible to vote in state-wide elections actually voted to approve in-state increases. For example, only 7,080 Texas cattle producers,<sup>11</sup> out of a total population of 149,000 Texas cattle producers<sup>12</sup> actually voted in Texas’ recent referendum to increase their state’s checkoff assessment. And, only 4,718 of the 7,080 Texas producers<sup>13</sup> voted in favor of the increase. This means that only 3 percent of Texas’ eligible cattle producers voted in favor of increasing the state’s checkoff assessment.

Ohio portrays a similar, minority-led campaign to increase its state’s checkoff assessment and it was only able to do so by changing the referendum rules following the failure of its first referendum. Although Ohio has 26,000 cattle producers,<sup>14</sup> only 1,527 cattle producers,<sup>15</sup> or fewer than 6 percent of eligible voters, voted in favor of increasing Ohio’s in-state checkoff assessment.

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<sup>9</sup> Anecdotal evidence indicates that past producer polls were conducted using producer lists provided by the NCBA.

<sup>10</sup> 79 Fed. Reg., at 66,685, col. 2.

<sup>11</sup> See County by County Referendum Totals, Texas Department of Agriculture, attached hereto as Exhibit 5.

<sup>12</sup> Farms, Land in Farms, and Livestock Operations, 2007 Summary, USDA National Agricultural Statistics Service, February 2008 (latest available data), at 15, available at [http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2000s/2008/FarmLandIn-02-01-2008\\_revision.pdf](http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2000s/2008/FarmLandIn-02-01-2008_revision.pdf).

<sup>13</sup> See County by County Referendum Totals, Texas Department of Agriculture, attached hereto as Exhibit 5.

<sup>14</sup> Farms, Land in Farms, and Livestock Operations, 2007 Summary, USDA National Agricultural Statistics Service, February 2008 (latest available data), at 15, available at [http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2000s/2008/FarmLandIn-02-01-2008\\_revision.pdf](http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2000s/2008/FarmLandIn-02-01-2008_revision.pdf).

<sup>15</sup> Ohio Beef Checkoff Referendum, Ohio Cattlemen’s Association, attached hereto as Exhibit 6.

Minnesota, a state with 25,000 cattle producers,<sup>16</sup> voted against that state’s proposed assessment increase<sup>17</sup> as did California, a state with 17,000 producers.<sup>18</sup>

As described below in greater detail (*infra*, at 12-13), the facts show that the ratio of checkoff collections to cow numbers in brand-law states where brand inspectors are required to collect the checkoff fee on all country sales is much higher than in non-brand states where collection is based on the honor system. This tells us that when given a choice under the honor system, U.S. producers choose not to pay the checkoff. This contradicts the Secretary’s claim that i) support for the current checkoff is high and, ii) producers support an increase to the checkoff rate.

R-CALF USA is not aware of any evidence, either anecdotal or empirical, that supports the Notice’s contention that there are indices suggesting that “most” producers support an increase to the Beef Checkoff Program’s assessment rate.<sup>19</sup> In fact, R-CALF USA believes this contention is directly contradicted by available facts and is, therefore, false.

**C. Any Increase to the Beef Checkoff Program’s Assessment Rate Would Exacerbate the Already Intolerable Corruption and Inefficiencies that Pervade the Current Beef Checkoff Program.**

**1. The Secretary Is Allowing Private Corporations to Unlawfully Collect and Disseminate Beef Checkoff Program Assessments that Function Like Federal Taxes.**

The Supreme Court sanctioned the ongoing operation of the Beef Checkoff Program on the basis that the exclusive purpose of the mandatory assessment is to fund government speech, thus establishing that Beef Checkoff Program assessments function essentially like government-mandated excise taxes. Prior to the Supreme Court ruling, it is likely that neither the Secretary nor his predecessors, nor perhaps even Congress, viewed the Beef Checkoff Program as a mandatory program with which to fund government speech through the collection of assessments on the sale of cattle that are indistinguishable from taxes. Post ruling, however, there can be no doubt that the Secretary has a heightened duty to ensure that the government-mandated assessments that the Supreme Court has essentially characterized as taxes are properly collected and expended by governmental entities. That heightened duty is in addition to the duties prescribed for the Secretary under the 1985 Beef Checkoff Program because neither the 1985 Act

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<sup>16</sup> Farms, Land in Farms, and Livestock Operations, 2007 Summary, USDA National Agricultural Statistics Service, February 2008 (latest available data), at 15, available at [http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2000s/2008/FarmLandIn-02-01-2008\\_revision.pdf](http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2000s/2008/FarmLandIn-02-01-2008_revision.pdf).

<sup>17</sup> Minnesota Beef Producers Reject Check-off Fee Hike, Associated Press, April 2, 2014, available at <http://minnesota.cbslocal.com/2014/04/02/minnesota-beef-producers-reject-check-off-fee-hike/>.

<sup>18</sup> Farms, Land in Farms, and Livestock Operations, 2007 Summary, USDA National Agricultural Statistics Service, February 2008 (latest available data), at 15, available at [http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2000s/2008/FarmLandIn-02-01-2008\\_revision.pdf](http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2000s/2008/FarmLandIn-02-01-2008_revision.pdf); *see also* Proposed Increase in the California Beef Council Assessment Rate Not Approved, California Department of Food and Agriculture, August 16, 2012, attached hereto as Exhibit 7.

<sup>19</sup> 79 Fed. Reg., at 66,685, col. 2.

nor the subsequent Order contemplated the elevated stature that the Supreme Court has now assigned to the program.

But, despite this heightened duty, the Secretary is allowing non-governmental, private corporations to collect and disseminate the federal assessments imposed on the sale of cattle. Anecdotal information suggests there are as many as 12 state-wide beef councils that were not established by enabling legislation passed by their state legislatures. Instead, these state beef councils are mere private corporations formed by private citizens that have no authority to either collect or disseminate government-mandated assessments that the Supreme Court has essentially characterized as taxes now that the Supreme Court has ruled that those assessments are for the exclusive purpose of funding government speech.

Based on information and belief, the Hawaii Beef Industry Council, Kansas Beef Council, Maine Beef Industry Council, Maryland Beef Industry Council, Mississippi Beef Council, Nevada Beef Council, North Carolina Beef Council, Oklahoma Beef Council, South Dakota Beef Industry Council, Utah Beef Council, Vermont Beef Industry Council, and West Virginia Beef Industry Council are examples of privately-held corporations established without any enabling legislation that are unlawfully collecting and disseminating the mandatory cattle assessments that have now been essentially characterized as taxes under the Secretary's watch. R-CALF USA believes this circumstance has been rendered unlawful by the Supreme Court's 2006 Beef Checkoff Program ruling.

If the Secretary takes no action, or worse, increases the assessment on U.S. cattle producers by requiring them to continue funding privately-held corporations through the collection of government mandated assessments while simultaneously assessing yet another assessment under the 1996 Generic Act that has not yet been declared a mechanism for funding government speech, U.S. cattle producers will be relegated to being exploited pawns by the Secretary.

R-CALF USA believes the Secretary is duty-bound to immediately end the corruption, conflicts of interest and abuses pervading the current Beef Checkoff Program that has been elevated by the Supreme Court as a program intended to fund government speech through the assessment of what the court has essentially characterized as excise taxes on the sale of cattle. R-CALF USA further believes the Secretary has full authority to immediately suspend the 1985 Beef Checkoff Program pending the development and implementation of a the new beef checkoff program, at which time the Secretary can permanently terminate the current, 1985 Beef Checkoff Program with Congress' assistance.

2. No Assessment Rate Increase is Warranted Because the Secretary Is Allowing State Beef Councils, Including Those that are Privately-Held Corporations, to Waste Current Checkoff Funds by Allowing the Councils to Spend an Unlimited Amount of Checkoff Dollars on Administrative Expenses.

Both the 1985 Act and Order restrict the Cattlemen's Beef Board from expending more than 5 percent of the total assessments it collects each year under the current Beef Checkoff

Program on administrative costs. But, no comparable restriction is imposed on state beef councils that collect \$1 per head for all cattle sold in their respective state and then are obligated to send only \$0.50 to the Cattlemen's Beef Board. Thus, only about one-half of the approximately \$80 million dollars collected from producers each year is subject to the 5 percent cap on administrative costs. This is outrageous.

Financial reports and audits demonstrate that some state beef councils spend upwards of 46 percent of the beef checkoff funds they retain on administrative costs. For example, the 2012 annual report of the Minnesota Beef Council reveals that between 32–35 percent of the beef checkoff assessments it retained were spent on administration.<sup>20</sup> In 2013, the Ohio Beef Industry Council spent between 30–34 percent of the beef checkoff assessments it retained on administrative costs.<sup>21</sup> The Montana Beef Council spent about 34 percent of the assessments it retained on administrative costs.<sup>22</sup> The North Dakota Beef Commission spent 46-48 percent and 38-40 percent of the checkoff funds the retained in their state on administrative costs in 2012 and 2013, respectively.<sup>23</sup> Research further shows that in 2009-2010, the Oregon Beef Council spent about 25 percent on expenses labeled “Administration” and over 13 percent on expenses labeled “Legislative,” without providing any information regarding the extent to which such a large legislative expense did or did not involve the unlawful practice of lobbying.<sup>24</sup>

Since only one-half of the \$80 million in checkoff funds collected each year is subject to the 5 percent administrative cap, and if 35 percent of the other half retained by state beef councils is spent on administrative costs, then the effective rate of expenditures for administrative costs under the current Beef Checkoff Program each year would be 20 percent. Clearly Congress did not intend for state beef councils to have unlimited use of producer-paid assessments that function like tax revenues to pay their administrative costs, yet that is what USDA currently allows in its lax enforcement of the current Beef Checkoff Program. This renders the current Beef Checkoff Program inefficient, wasteful, and corrupt.

Additional evidence regarding the inefficiency and wastefulness of the current Beef Checkoff Program includes recent studies that found the Pork Checkoff Program to be far more efficient than the Beef Checkoff Program. A 2012 Cornell University study concluded that pork producers earned a \$17.40 return for every dollar they contributed to the national Pork Checkoff Program.<sup>25</sup> However, the same author found that the return on investment for cattle producers that contribute to the Beef Checkoff Program was much less (\$6.20 less) as he concluded that they only received \$11.20 for each dollar they are assessed.<sup>26</sup> While a comparison of these studies completed by the same author demonstrates the author found that pork producers

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<sup>20</sup> See Minnesota Beef Research and Promotion Council, 2012 Annual Report, attached hereto as Exhibit 8.

<sup>21</sup> See Ohio Beef Council, 2013 Annual Report, attached hereto as Exhibit 9.

<sup>22</sup> See Montana Beef Council, 2013 Annual Report, attached hereto as Exhibit 10.

<sup>23</sup> See Audit Report, North Dakota State Beef Commission, FY 2012-2013, North Dakota Office of the State Auditor, at 7, 13, attached hereto as Exhibit 11.

<sup>24</sup> See Oregon Beef Council, 2009-2010 Year in Review, attached hereto as Exhibit 12.

<sup>25</sup> See An Economic Analysis of the National Pork Board Checkoff Program, Harry M. Kaiser, Cornell University, April 12, 2012, at 4, 31-32, attached hereto as Exhibit 10.

<sup>26</sup> See An Economic Analysis of the Cattlemen's Beef Promotion and Research Board Demand-Enhancing Programs, Harry M. Kaiser, Cornell University, June 25, 2014, attached hereto as Exhibit 11.

received a much bigger benefit than beef producers from their respective checkoff programs, R-CALF USA finds the Cornell University beef checkoff program study, which purportedly used input data provided by the NCBA and the Cattlemen's Beef Board that commissioned it, to be wholly unsupportable and outrageous.

The National Chicken Council compiled USDA data that show during the 29 years of the national Beef Checkoff Program's operation, during which a total of approximately \$2.3 billion of producer checkoff dollars were spent,<sup>27</sup> per capita beef consumption fell by about one-third, from 79.2 lbs. per person in 1985 to only 54.1 lbs. per person in 2014. Yet, per capita consumption of poultry, an industry that has no checkoff program, grew by over 35 pounds per person, an astounding 55 percent increase in per capita consumption during the same period. The Beef Checkoff Program has not increased either per capita beef consumption or total beef consumption, nor has it increased beef demand.<sup>28</sup> The increased cattle prices that U.S. cattle producers have realized over the past few years and the increased wholesale and retail beef prices realized by downstream sectors are a direct function of having the smallest U.S. cattle herd in 70 years combined with a steadily growing U.S. population that has created a significant economic imbalance between supply and demand. The Cornell University study's claim that if producers were not being assessed \$1 per head then they would not be realizing the prices they are today is, again, unsupportable and outrageous.

3. No Assessment Rate Increase is Warranted to Carry Out the Beef Checkoff Program's Long-range Plan Because that Plan Proposes Strategies that Are Prohibited Under the Beef Checkoff Program's Act and Order.

The USDA asserts without any basis that the members of the Secretary's Cross Industry Working Group (CIWG) agreed that the national Beef Checkoff Program was underfunded to meet its long-range plan.<sup>29</sup> This uncritical and unfounded assertion is, at best, problematic because some of the strategies listed in the long-range plan would require the unlawful practice of influencing governmental action or policy, better known as lobbying. In fact, one of the strategies states that the Beef Checkoff Program will "[c]oordinate lobbying efforts among like-minded beef industry advocates."<sup>30</sup> This is, at least, prima facie evidence of intent to engage in unlawful activities. Worse, the USDA appears oblivious to if not complicit in this wrong-headed proposal and actually appears sympathetic to those who want to increase producer assessments so they can channel producer tax dollars toward unlawful activities.

### III. RESPONSES TO THE QUESTIONS & ANSWERS SECTION OF THE NOTICE

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<sup>27</sup> Based on the estimated \$80 million collected each year under the national Beef Checkoff Program.

<sup>28</sup> See Annual Choice Beef Demand Indexes, 1980=100 and 1990=100, AgManager Information, Kansas State University (The beef demand index for Choice beef fell nearly 17.5 points from 1985-1990 and by nearly 17 points from 1991-2012 ), available at <http://www.agmanager.info/livestock/marketing/Beef%20Demand/default.asp>.

<sup>29</sup> See 79 Fed. Reg., at 66,685, col. 2 (stating that CIWG members agreed the program was underfunded to meet its long-range plan).

<sup>30</sup> Protect and Enhance our Freedom to Operate, Core Strategies and Strategic Initiative 2013/2014 Updates, Cattlemen's Beef Board, Updated January 2014, attached hereto as Exhibit 12.

**A. There Is No Basis for USDA’s Assertion of a General Industry Recognition of a Need to Increase Beef Checkoff Program Funding.**

For the reasons stated in Section II above, R-CALF USA disagrees with USDA’s unfounded opinion that cattle producers who are now assessed/taxed \$1 per head for the exclusive purpose of funding government speech are desirous of increasing that assessment/tax to fund even more government speech. Instead, as is documented above, the current national Beef Checkoff Program is fraught with corruption, abuse, lack of oversight, and conflicts of interest and its operations are inefficient and wasteful. If the foregoing problems were corrected, the \$80 million currently assessed from cattle producers would likely be more than sufficient to meet the objectives of a genuine beef promotion and research program.

**B. The Secretary Does Not Need to Solicit Comments or Suggestions from the Beef Industry Prior to Performing His Executive Duty to Put an End to the Ongoing Conflicts of Interest, Corruption, Abuses and Wastefulness Plaguing the Current National Beef Checkoff Program.**

While R-CALF USA appreciates the opportunity to provide comments to USDA regarding what specific elements would be required to create an ideal beef checkoff program, this opportunity is no substitute whatsoever for the critical need to put an immediate halt to the manifest conflicts of interest, corruption, abuses and wastefulness that pervade the current national Beef Checkoff Program. The Secretary has the authority, as well as an affirmative duty to act decisively to protect the integrity of the approximately \$80 million in assessments/taxes collected from cattle producers each year, particularly the approximately \$40 million that flows directly to the National Cattlemen’s Beef Association (NCBA) each year and is then used to enhance that group’s effectiveness at lobbying against the economic and political interests of many, if not most, U.S. cattle producers.

**C. The Promise of a Referendum Within 3 Years and Perhaps Another Within 7 Years All But Guarantees that the Federal Government Will Continue Its Illicit Funding of the NCBA for Up To 3 Years, if not Indefinitely.**

Unless the Secretary takes decisive steps to put an end to the ongoing conflicts of interest, abuses, corruption and wastefulness that pervades the current national Beef Checkoff Program, the proposal to hold a referendum within 3 years is nothing more than an effort to kick the can down the road. As a stand-alone measure the new program represents an abrogation of the Secretary’s duty to protect federally-controlled assessments, *i.e.*, taxes.

In just over two years, a new Administration will be in office and the only record it will see is the misleading statement discussed in Section III A above that claims the new program is needed only to increase funding for a beef checkoff program. Rather than allow two separate beef checkoff programs to run simultaneously, which a new Administration would likely view as redundant and inefficient, the most likely remedy would be for the new Administration to ask Congress to raise the existing national Beef Checkoff Program assessment rate.

Under this highly probable scenario, absolutely nothing will be done for at least another two years, if not for perpetuity, to protect the integrity of the \$80 million that is collected from U.S. cattle producers each year against the known conflicts of interest, abuses, corruption and wastefulness now occurring in the current national Beef Checkoff Program.

**D. Allowing the Current National Beef Checkoff Program Established Under the 1985 Act to Remain Untouched During the Pendency of the Secretary's New Proposal Is an Affront to Cattle Producers that have a Right to Expect the Secretary Will Protect Their Mandatory Assessments.**

It is unfathomable that the Secretary is powerless to immediately suspend, if not terminate, the current national Beef Checkoff Program established under the 1985 Act while the Secretary is establishing a new beef checkoff program under the 1996 Act. There are compelling reasons why the Secretary should exercise his broad authorities as a presidential cabinet member to redress the conflicts of interest, abuses, corruption, inefficiencies and wastefulness pervading the current national Beef Checkoff Program. Below is a short list of those compelling reasons:

1. Neither the 1985 Act nor Order ever contemplated that the major contractor of checkoff funds would actually house, administer and control the entity that possess one-half the votes needed to award checkoff contracts.
2. The 1985 Act does not allow a full-time lobbyist organization to also be the direct recipient of Beef Checkoff Program funds. There is nothing in the Act that even remotely allows an organization to circumvent the Act's prohibition against lobbying merely by claiming that it has erected an internal, Chinese Wall, which, incidentally, has been repeatedly breached.
3. Neither the 1985 Act nor Order ever contemplated that the checkoff program would be elevated by the U.S. Supreme Court from a producer self-help program to a program that exclusively funds government speech through government-mandated assessments, *i.e.*, taxes, thus imposing a governmental duty to protect those assessments/taxes that supersedes the statutory provisions in the 1985 Act.
4. The Secretary has broad authority to eliminate conflicts of interest within USDA-controlled programs.
5. An independent compliance report concluded that the NCBA had breached the financial firewall that the NCBA claimed was protecting the integrity of producer assessments.<sup>31</sup>
6. The USDA's own OIG, after a three-year investigation, "could not determine that all funds were collected, distributed, and expended in accordance with the Act and Order."<sup>32</sup>
7. The aforementioned independent compliance report and OIG investigation found that NCBA had misappropriated hundreds of thousands of dollars of producer-paid assessments/taxes and required the NCBA to pay the ill-gotten monies back to the

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<sup>31</sup> *Supra*, at 2.

<sup>32</sup> Letter from the USDA Office of Inspector General to R-CALF USA CEO Bill Bullard, Jan. 31, 2014, at 3, attached hereto as Exhibit 13.

federally-controlled national Beef Checkoff Program, but no meaningful remedial action was taken.

The Notice fails completely to explain why the Secretary has chosen not to redress any of the intolerable circumstances associated with the current national Beef Checkoff Program even though the Notice at least acknowledges that the beef industry has concerns about the current structure of the current Beef Checkoff Program.<sup>33</sup>

#### **IV. RESPONSES TO THE COMMENT PROCEDURES SECTION OF THE NOTICE**

##### **1. Who should be assessed?**

**Answer:** R-CALF USA knows of no other immediate solution to the ongoing problem of disparate treatment of cattle producers in brand states versus those in non-brand states than to assess meatpackers rather than producers. Cattle producers in brand-law states are contributing a disproportionate amount of checkoff dollars to the national Beef Checkoff Program because the so-called honor system in effect in the majority of states (*i.e.*, non-brand states) is not working.

In a 2013 presentation to the Nebraska Farmers Union, David Wright, President of the Independent Cattlemen of Nebraska (ICON), clearly articulated the phenomenon whereby non-brand states are paying a disproportionately smaller share into the Beef Checkoff Program when compared to brand states. He said that in the state of Nebraska, which is a split brand state, checkoff collections from country sales in the non-brand area totaled \$4,200 while collections in the brand area totaled \$450,000.<sup>34</sup>

David Wright further provided a map of the United States depicting the 14 brand states and the remaining non-brand states.<sup>35</sup> In the 14 brand states that had a total of 13.9 million mother cows, the Beef Checkoff Program collected \$26.9 million, which is nearly \$2 for every mother cow in the region. In sharp contrast, however, the non-brand states in the eastern part of the United States have 15 million mother cows but collected only \$16 million for the Beef Checkoff Program.<sup>36</sup>

The evidence provided by David Wright demonstrates that brand-state producers are being disadvantaged and exploited under the current Beef Checkoff Program because the collection procedures and collection points under the current program are patently inequitable.

Of course, one way to end the disparate treatment among brand states versus non-brand states is to continue assessing producers under a voluntary, opt-in program whereby all producers would be given the choice of whether or not to participate in the program at all. This would truly be a more market-driven program because producers that perceive a market benefit will be more than happy to voluntarily contribute. On the other hand, producers who believe it inappropriate

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<sup>33</sup> 79 Fed. Reg., at 66,685, col. 3.

<sup>34</sup> ICON President David Wright on History of Beef Checkoff, Nebraska Farmers Union, Youtube, available at <https://www.youtube.com/watch?v=ugMHu30jDWI>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

for the government to be so intimately involved in their business operations can choose not to participate.

Because R-CALF USA members-policy strongly supports the use of domestically-collected checkoff funds to promote beef exclusively born, raised and slaughtered in the United States, we would support either exempting importers and their beef/cattle from collection requirements altogether or allowing funds collected from imported cattle and beef to be used to promote foreign beef, so long as checkoff funds collected from domestic cattle can be used exclusively to promote exclusively USA beef.

## **2. What should be the board structure?**

**Answer:** The board should be comprised of bona fide cattle producers.

- **Who is eligible to serve?**

**Answer:** Any bona fide cattle producer or his or her spouse that is 18 years of age or older.

- **Should there be a relatively large delegate body appointed by the Secretary that would elect and recommend from within itself a smaller board?**

**Answer:** No. All board member should be elected by bona fide cattle producers that reside in the region that is to be represented by the board member.

- **What should be the size of the board?**

**Answer:** The board should be comprised of between 15 and 50 members. The United States should be divided into regions based on mother cow numbers, including at least one region to specifically represent Native American tribes that raise cattle, and each region would be eligible to elect one board member.

- **What should be the term of office?**

**Answer:** The term of office should be four years and no board member should be allowed to serve more than two terms.

## **3. How should the board be selected?**

**Answer:** Bona fide Producers desiring to serve on the board should submit to the Farm Service Agency (FSA) a petition signed by at least 20 other bona fide cattle producers that would qualify that producer's name to be included on a ballot.

- **Who may nominate eligible candidates to serve?**

**Answer:** Bona fide cattle producers that can prove through bill of sales that they have sold cattle in each of the previous three years may seek a nomination to serve on the board by obtaining at least 20 signatures from other bona fide cattle producers on their nomination petition.

- **What should be the nomination and selection process?**

**Answer:** The names of bona fide producers that have obtained the requisite number of signatures on their petition shall be placed on a ballot. The elections shall be held at all county FSA offices in each region and producers shall be accorded a window of up to 30 days to vote. Notices to cattle producers regarding their opportunity to vote at their local FSA office should also include an option for an absentee ballot that would allow producers to cast their vote via U.S. Mail in lieu of physically voting at their FSA office, which may be located a considerable distance from producers.

#### **4. What should be the powers and duties of the board?**

**Answer:** To hire staff members that would, on behalf of the board, solicit proposals from vendors capable of carrying out the objectives of the board. To avoid the revolving door syndrome, staff members shall not have been previously employed by any policy oriented advocacy group or meatpacking firm. The board shall have the power to select the vendors of its choice and to contract directly with selected vendors to carry out the board's purpose. The board shall have the duty to oversee vendors to ensure they are meeting contract requirements. The board shall be expressly prohibited from contracting with any organizations or their subsidiaries that have a history of engaging in activities intended to influence governmental action or policy on either the state or national level.

#### **5. Who has decision-making authority?**

**Answer:** The board shall be vested with decision-making authority with respect to the approval of contracts and the suspension or termination of contractors that fail to meet program standards or otherwise engage in improper activities.

- **Should funding decisions be made by the full board or a smaller body elected from within this board?**

**Answer:** At between 15-50 members, the board should be capable of making all funding decisions without needing to rely upon even smaller bodies. However, the board should not be precluded from forming committees within itself through an election process provided the delegation of authority to any committee is only to make recommendations to the board. Committee recommendation brought to the full board should be subject to a two-thirds voting requirement prior to adoption.

- **Should funding decisions be made in conjunction with other organizations such as the Federation of State Beef Councils or the current Cattlemen's Beef Promotion and Research Board?**

**Answer:** Absolutely not. The board must act as a legally independent organization when making funding decisions.

#### **6. How should the assessment rate be determined?**

**Answer:** It should be initially set at \$1 provided the current Beef Checkoff Program is suspended or terminated to prevent the collection of any more than \$1 per head of cattle.

- **Should the assessment be a specified amount, a percent of value, or an amount determined by board?**

**Answer:** The assessment should be the specified amount of \$1 per head and a two-thirds majority vote by eligible voting producers should be required before the assessment rate can be increased.

- **If a specified amount or a percent of value, should there be provisions for adjustments to the rate by the board, and without subsequent producer referendum?**

**Answer:** Under no circumstances shall the initial assessment rate of \$1 per head be increased unless two-thirds of the producers voting in a referendum vote for an increase.

- **Should there be a de minimis exemption for certain size operations or classes of cattle or beef?**

**Answer:** No. this would be difficult to enforce when the assessments are levied at the point of slaughter.

- **Should there be temporary or permanent provisions for refunds of assessments?**

**Answer:** No, this would be difficult to administer when the assessments are levied at the point of slaughter.

## **7. How should assessments be collected?**

**Answer:** The meatpackers should be assessed \$1 per head at the point of slaughter.

- **Should the States or the national board collect the assessment?**

**Answer:** The national board should collect the assessment.

- **Should the assessment be levied at all points of sale, at slaughter, or at some other time?**

**Answer:** The assessment should be levied only at the point of slaughter.

## **8. When should the referenda be conducted?**

**Answer:** The first referenda should be conducted within 3 years of the issuance of the Order. On the fifth year following the first referenda, and every fifth year thereafter, an automatic referendum shall be held to determine if the majority of cattle producers believe the program should be continued or terminated.

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Voting in the referenda should be held at all county FSA offices and producers should be accorded a window of up to 30 days to vote. Notices to cattle producers regarding their opportunity to vote in the referenda at their local FSA office should also include an option for an absentee ballot that would allow producers to cast their vote via U.S. Mail in lieu of physically voting at their FSA office, which may be located a considerable distance from producers.

## V. CONCLUSION

R-CALF USA appreciates the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Bullard". The signature is stylized and cursive, with a large initial "B" and a long, sweeping underline.

Bill Bullard, CEO