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Legal Checkup on Checkoffs: “Redirection” and Producer Refunds Under the Beef Checkoff

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This article is part of a “Legal Checkup on Checkoff” series addressing federal and state research and promotion programs, commonly referred to as “checkoff” programs. Specifically, this article addresses the USDA Agricultural Marketing Service (“AMS”) final rule titled, *Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research; Amendments to Allow Redirection of State Assessments to the National Program; Technical Amendments* (“Redirection Rule”). Even more specifically, the article focuses on the portion of the Redirection Rule which determines whether a “Qualified State Beef Council” (“QSBC”) is “authorized or permitted” to pay producer refunds of assessments paid under the Beef Promotion and Research Act of 1985 (“Beef Act”).

The Redirection Rule requires that, under certain circumstances, a QSBC must “redirect” to the Cattlemen’s Beef Board (“Board”) the portion of the national beef checkoff assessment that the QSBC would have otherwise physically retained and expended under the Beef Act and applicable state laws. The Board and QSBCs are discussed below, as well as the three-step process set out in the Beef Act for the payment, collection, and remittance of the dollar-per-head assessment. To trigger the redirection requirement, producers in states whose QSBC is “authorized or permitted” to provide producer refunds need only submit a refund request to the appropriate QSBC. However, under no circumstances can a producer lawfully *obtain* the requested refund.

The same dynamic applies to producer refunds under the national soybean checkoff, which will be addressed separately in an upcoming article in this series since there are important distinctions with respect to the national soybean checkoff vis-à-vis this aspect of the Redirection Rule. Importantly, this discussion of producer refunds under the Redirection Rule does not pertain to producer refunds available under a state-only beef or soybean checkoff program. The state-only programs operate in addition to the national beef or soybean checkoff program.

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Redirection Rule

At first glance, the refund-related portion of the Redirection Rule appears as simple as it does confounding:

- A producer may *request* a refund from a QSBC that is “authorized or permitted” to pay refunds;
- The producer cannot lawfully *obtain* the refund he or she requested; and
- The producer’s request for a refund triggers the legal requirement that the QSBC at issue must “redirect” to the Board the amount equal to the refund request that, in accordance with the Beef Act, the QSBC otherwise would have physically retained and expended.

The “authorized or permitted” requirement found in the Redirection Rule may mean that redirection can be triggered even if the QSBC is only authorized to offer a refund *but does not actually offer a refund*. Under that interpretation, a producer would request a non-existent refund in order to force the QSBC to redirect to funds to the national Board.

Path to the Redirection Rule: 1976 to 2019

The legislative and regulatory background of the rule is important because it provides insight into the current status of the refund-related portion. While this background is dense and sometimes difficult to follow, it helps illustrate the rationale behind the rule and an understanding of the role of producer refunds under the national beef checkoff that may otherwise be unknown.

1976

The legislative foundation of the national beef checkoff was the Beef Research and Information Act of 1976 (“1976 Beef Act”), even though it was voted down in two producer referendums and never went into effect.¹ However, it is important in two main aspects of understanding the rule as it stands today. First, the 1976 Act did not require a specific role for states on par with the role prescribed in the Beef Act, which is important because nearly half the states had some kind of state-only checkoff program in place at that time. Second, the 1976 Beef Act expressly contained a provision that would have allowed producers to request and receive a refund of the full assessment.

1985

On December 23, 1985, Congress enacted the Beef Act as part of the landmark Food Security Act of 1985, commonly known as the 1985 Farm Bill. By that time, nearly forty states had established some type of state-level checkoff. In regards to the Redirection Rule, the Beef Act was different from the 1976 Act in two important ways. First, the Beef Act set up the national beef checkoff to operate as a federal-state partnership with the purpose of creating a “coordinated program of promotion and research designed to strengthen the beef industry’s position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.” In

¹ C.E. Ball, Historical Overview of Beef Production and Beef Organizations in the United States. (“Despite opposition from consumer groups, as well as the American Farm Bureau Federation and the National Farmers Union, Congress passed legislation in 1976 and the first producer referendum was held in 1977. It failed, as did the second referendum in 1980.”) The first referendum was held in 1977 and garnered 56.6% “yes” votes. The second attempt in 1980 mustered 34% “yes” votes.

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doing so, Congress created QSBCs and the Board and outlined the roles and responsibilities of each. Second, the Beef Act allowed a “one time” refund of assessments that were paid before the required producer referendum took place.

The Beef Act required the USDA Secretary to issue an initial Beef Order, which was accomplished on July 18, 1986. The initial Beef Order launched the national beef checkoff, specifically including the collection and remittance of the dollar-per-head assessment by QSBCs and the Board. The continuation of the national checkoff, though, depended on the outcome of the producer referendum. If the producer referendum passed, the Beef Act required that the national beef checkoff would continue, but producer refunds would no longer be available. It did pass, continuing the national beef checkoff through present day, and, at that time, with the understanding that producer refunds no longer available.

The Beef Order defines a QSBC as “a beef promotion entity that is authorized by State statute or a beef promotion entity organized and operating within a State that receives voluntary assessments or contributions; conducts beef promotion, research, and consumer and industry information programs; and that is certified by the Board pursuant to this subpart as the beef promotion entity in such State.” Thus, Congress created all QSBCs to be equal, regardless of whether they were voluntary, mandatory under state law, or offered producer refunds at the time the Beef Act was enacted. The Beef Act also established the Board, prescribing to it the responsibility of carrying out the day-to-day administration of beef checkoff as overseen by USDA AMS.

For a state beef entity to become a QSBC, the Beef Act required that the entity be “certified” by the Beef Board. To be certified as a QSBC, a state entity had to agree to certain requirements such as agreeing to help strengthen beef’s position in the marketplace and ensuring compliance with collection and proper remittance of assessments.

The Beef Act sets out a mandatory three-step process for the payment, collection, and remittance of the one-dollar-per-head assessment that would be divided between QSBCs and the Board. First, the Beef Act mandates that the purchaser shall collect the assessment from the producer. Second, the purchaser is required to remit the assessment to the QSBC certified to operate within that state. Finally, federal law requires the QSBC to remit to the Board the assessment, *minus* the so-called “producer credit” found at 7 C.F.R. § 1260.172(a)(3). Practically speaking, the producer credit equals one-half of the dollar-per-head assessment. Thus, when this three-step process is complied with, the net result is always that the QSBC retains physical possession of one-half of the national beef checkoff assessment. The Redirection Rule creates an avenue for the flow of assessment funds that is outside this three-step process.

The Beef Act does not require that a state certify a state entity as a QSBC. In the unusual event a state opted to not have a QSBC, Congress mandated that the QSBC remit the full assessment to the Board. In recent years, a new scenario has arisen in which a state may not have a QSBC: “decertification”. Decertification is the process by which the Board and/or USDA AMS would seek to revoke the state entity’s certification, thereby terminating its existence such that all assessments paid by producers in the applicable state would be remitted to the Board. The issue of decertification will be explored in a subsequent article in this series.

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1995

The President’s Regulatory Review Initiative, issued on March 4, 1995, ordered a government-wide review of regulations. The main goal was for federal agencies to identify and remove obsolete regulatory language. As a result, AMS removed all five refund-related regulatory sections that were contained in the initial Beef Order. The removed provisions were, at that time, believed to only apply to the “one time” availability of producer refunds under the Beef Act. Fast forward to today, the Redirection Rule contradicts that earlier understanding, as USDA AMS reinstated one of the five refund regulatory sections that were removed in 1995.

Specifically, in the November 28, 1995 final rule in which these provisions were removed, AMS established that:

Sections which are obsolete or are duplicated in other sections involve initial membership on the Board (§ 1260.580 and § 1260.590. Other sections (§1260.150, 151, 173, 174, and 181) originally implemented a statutory provision allowing producers to request refunds prior to the May 1988 referendum and provided for establishing escrow accounts to pay refunds. These sections became obsolete after a referendum in which producers voted in favor of mandatory assessments. . . .

After consideration of all relevant material with regard to the removal of the provisions as hereinafter set forth, it is found that these provisions no longer tend to effectuate the declared policy of the Act. . . .

The sections being removed are either duplicative or obsolete and removal will no longer alter any aspect of the program.

Specifically, the removed language established that in order for a state entity to be certified as a QSBC, the entity had to agree that if it were “authorized or required to pay refunds to producers . . requests from producers for refunds . . . will be honored by forwarding to the Board that portion of such refunds equal to . . .” the producer credit.

2016

More than two decades later, USDA AMS issued the proposed Redirection Rule on July 15, 2016. As noted, USDA AMS stated that the proposed rule was issued to remedy the problem created when it “inadvertently” removed the above-described provision in 1995.²

² While not a focus of this article, it bears noting that the proposed rule was issued approximately two months after *Ranchers Cattlemen Legal Defense Fund v. USDA* was filed in the United States District Court for the District of Montana and roughly two weeks before USDA’s first response was filed. In *R-CALF*, the plaintiff argued that its members should be able to forward the full dollar-per-head assessment required under the Beef Act to the Board, but that it knew of no policy or process allowing it to do so. USDA filed its initial response on August 4, 2016. That response focused almost entirely on the argument that proposed Redirection Rule made clear that cattle producers such as R-CALF members could forward – or “redirect” – the full assessment to the Board should they choose to do so. Ironically, the litigating parties actually agreed with one another on a central issue in litigation that continues more than four years later, has engulfed more than a dozen other states’ QSBCs, and has even spawned into a

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2018

On January 4, 2018 the Redirection Rule was withdrawn from the Federal Register. Thus, it appeared at that time that the proposed Redirection Rule was removed from the rulemaking process altogether. Several days later, though, USDA issued a correction that reversed the decision to withdraw the proposed rule.

2019

The Redirection Rule was issued by USDA AMS as a final rule on May 13, 2019, becoming effective June 12, 2019. As noted, the underlying rationale for the Redirection Rule was that AMS was trying to fix the “inadvertent” error that was committed in 1995 when it removed language pertaining to a QSBC that is “authorized or required” to provide producer refunds. In the final rule, AMS explained the following:

In late 1995, 7 CFR 1260.181(b)(5) was removed as part of rulemaking to eliminate obsolete regulatory rulemaking. However, the rulemaking inadvertently removed language that should have been retained regarding a producer’s ability to redirect funds to the national program should they choose to do so. While this provision was removed from the order, QSBCs were still required to comply with the terms of their certification as a QSBC and, therefore, continued to allow for redirection of funds at the producer’s request. Therefore, AMS is adding provisions to remedy removal of the original language in § 1260.181.

The 2019 final rule, however, significantly changed the previously proposed language to remove any reference to the state statutes as well as the standard that the refunds be “required”. To illustrate, the 2016 proposed rule required that:

Qualified State beef councils which are authorized or required by State statutes to pay refunds to producers must certify to the Board that any requests from producers for refunds from the council for contributions to such council by the producer will be honored by redirecting to the Board that portion of such refunds equal to the amount of credit received by the qualified State beef councils.

However, the final rule requires QSBCs to do the following:

(8) Certify to the Board, if the Council is authorized or permitted to pay refunds of contributions to the Council, that any requests from producers for such refunds by the producers will be honored by redirecting to the Board that portion of such refunds equal to the amount of credit received by the producer pursuant to § 1260.172(a)(3).

separate legal action filed in the United States District Court for the District of Columbia that could reshape the future operation of QSBCs and, by extension, state soybean boards operating under the national soybean checkoff. These issues will be addressed in subsequent articles in this series.

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Conclusion

The Merriam-Webster Dictionary defines “refund” in its verb form as “to give or put back” or “to return (money) in restitution, repayment, or balancing of accounts”. The term is defined in its noun form as “the act of refunding” or “a sum refunded”. The origin of the word has been traced to the early 15th century, when it was defined as a verb meaning “to give back, restore.” That definition evolved from use in the prior century of both the Old French term “*refunder*”, which translated to “restore”, and from the Latin term “*refundere*”, which translated to “give back, restore, return”. By the 18th century, the term also became a noun defined as “a return of money paid.” Thus, the commonly understood definition of the term “refund” has remained unchanged since its origins several centuries ago and has consistently centered on the notion of the returning or the giving back something of value, especially in the context of returning money to a person who has paid money.

During the “one time” refund period set out in the Beef Act, producers were entitled to receive a refund as that term has been defined since it originated several centuries ago. In 1995, AMS removed the refund-related provisions in the Beef Order because, in AMS’s words, those provisions “originally implemented a statutory provision allowing producers to request refunds prior to the May 1988 referendum and provided for establishing escrow accounts to pay refunds. These sections became obsolete after a referendum in which producers voted in favor of mandatory assessments. . . .”

Now, nearly a quarter-century after removal of the language, AMS expresses that the removal of one of several regulatory provisions was not only “inadvertent” but that its reinstatement into the Beef Order is the underlying rationale of the Redirection Rule. But, under the Redirection Rule, “refund” has a new meaning than it did the past several centuries, as well as a new meaning than the one understood in 1995 when the refund regulatory sections were removed from the Beef Order.

For the national beef checkoff, “refund” now means “redirection” since a cattle producer cannot actually obtain the return of a thing of value – i.e., a portion of the dollar-per-head assessment. Moreover, redirection means that the QSBC must remit to the Board assessment funds that the QSBC otherwise would have physically retained and expended. As noted, it is not clear whether the “authorized or permitted” requirement found in the Redirection Rule may mean that redirection can be triggered even if the QSBC is only authorized to offer a refund but has not exercised that authority such that it *does not actually offer a refund*. Under that interpretation, a producer would request a non-existent refund in order to force the QSBC to redirect to funds to the national Board. Further, it is not clear whether the standard applies absent existence of a state statute that “authorizes or permits” a QSBC to pay producer refunds.

In issuing the Redirection Rule, AMS estimated that twenty cattle producers nationwide (and ten soybean producers) would request redirection. Time will tell whether these estimates are accurate. Additionally, time will tell whether potential confusion over exactly how, where, and when the rule applies will trigger state-level legislation or even litigation to clarify how respective QSBCs treat refunds under the national beef checkoff.

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Additional Resources:

- To read the USDA Redirection Rule as proposed July 15, 2016, click [here](#)
- To read the USDA Redirection Rule promulgated as Final Rule May 13, 2019, click [here](#)
- To read USDA AMS Press Release accompanying final rule, click [here](#)
- For the Checkoff Programs Reading Room, click [here](#)
- For Center publications on checkoff programs, click [here](#)

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