University of Arkansas Division of Agriculture

An Agricultural Law Research Project

Soybean Checkoff Dollars & USDA "Redirection": Compatible with Federal Law?

Harrison Pittman

Director, National Agricultural Law Center

www.NationalAgLawCenter.org

INTRODUCTION

On July 15, 2016, the USDA Agricultural Marketing Service (AMS) issued a proposed rule that seeks to provide soybean producers in certain states the option of "redirecting" to the United Soybean Board (USB) the full, federally-required assessment of one-half of one percent of net market price of soybeans.[1] Redirection deprives a state's Qualified State Soybean Board[2] (QSSB) of funding it would have otherwise retained and expended in accordance with the Soybean Promotion, Research, and Consumer Information Act (Soybean Act)[3] and accompanying regulations- the Soybean Promotion, Research, and Consumer Information Order (Soybean Order)[4]. This article discusses AMS's existing policy of "redirection", the AMS proposed rule, and how redirection appears to be incompatible with the plain language of the Soybean Act and Soybean Order.

BACKGROUND

A. Federal Law: Three-Step Process

The Soybean Act and Soybean Order establish a rate of assessment of "one-half of 1 percent of the net market price of soybeans sold by the producer to the first purchaser."[5] This assessment fuels the national soybean research and promotion program at the federal and state levels.

The Soybean Act and Soybean Order establish the mandatory, three-step process for the payment, collection, and remittance of the assessment. The three-step process, when complied with, always concludes with the QSSB retaining the portion of the assessment that is not remitted to the USB; at least one-half of the original assessment.

The three step process is as follows:

(1) First purchasers "shall" collect the assessment from producers;
(2) First purchasers "shall" remit the assessment to the QSSB for the state in which the purchase occurred; and
(3) QSSBs remit to USB "each assessment paid and remitted to it, *minus authorized credits pursuant to § 1220.223(c) and credits issued to producers pursuant to § 1220.223(a)(3), and other authorized deductions. . . . .*"[6]

Thus, the Soybean Act and Soybean Order – not state law – requires the full assessment be paid to a QSSB by the first purchaser and that the QSSB collect, retain, and expend the portion of the original assessment not remitted to USB. One of the credits that must be retained is the producer credit, which equals one-half of the

---

[1] Soybean Promotion, Research, and Consumer Information; Beef Promotion and Research; Amendments to Allow Redirection of State Assessments to the National Program; Technical Amendments, 81 Fed. Reg. 45984 (proposed July 15, 2016) (to be codified at 7 C.F.R. pt. 1220).

[2] *See* 7 U.S.C. § 6302 (14) and 7 C.F.R. § 1220.122 (defining "Qualified State soybean board").

[3] 7 U.S.C.§§ 6301 – 6311.

[4] 7 C.F.R. pt. 1220.

[5] 7 U.S.C. § 6304(l)(1)(A)(ii).

[6] *See* 7 U.S.C. § 6304(l)(1). *See also* 7 C.F.R. §§ 1220.223, 1220.228(a)(1)(iv), 1220.228(b)(4).

original assessment.[7] It bears noting that any producer, first purchaser, or QSSB that does not comply with the three-step process stands in violation of the Soybean Act and Soybean Order.

B. AMS Redirection Policy & Proposed Rule

According to AMS, the redirection proposed rule "is intended to formalize" existing USDA policy that already allows soybean producers "the opportunity . . . to choose to direct the full federal assessment" to USB in those states "where payments to a QSSB are not required by State law."[8] AMS further explains that the redirection proposed rule applies when "(1) there is no state law requiring assessments to a state soybean board . . . , or (2) there is a state law requiring assessments, but the state law allows for refunds."[9]

DISCUSSION

The AMS redirection policy and proposed rule appear to be incompatible with the plain language of the Soybean Act and Soybean Order for at least three reasons. These are discussed below.

A. State Law Requiring Assessment to QSSB: Relevant Standard?

AMS explains that its redirection policy and proposed rule apply in any state where payments to the QSSB in that state are not required by the law of that state. However, this factor may be so irrelevant that it cannot be a basis of the redirection policy or proposed rule.

As noted, the Soybean Act and Soybean Order establish the mandatory, three-step process for the payment, collection, and remittance of the full assessment. Unless a producer, first purchaser, or QSSB fails to comply with the mandatory process, the QSSB will retain (and expend) the portion of the assessment that it is not legally required to remit to USB – at least one-half of the original assessment.[10] That process in no way includes, involves, or is influenced by the existence or non-existence of a state law requiring that the assessment be paid to the QSSB in that state.

One can therefore conclude that AMS's belief that redirection applies in each state in which there is no law requiring the assessment to the QSSB is essentially a false standard; one that is wholly irrelevant and outside the legal bounds expressly established in the Soybean Act and Soybean Order. Yet, that standard is the underpinning for AMS's policy of redirection, which the proposed rule "is intended to formalize."

B. Producer Refunds: Preempted or Superseded?

AMS explains that the proposed rule also applies in those states in which there is a state law requiring assessments to a QSSB but also simultaneously has a state law that allows for producer refunds. According to

[7] 7 U.S.C. § 6304(l)(4).

[8] 81 Fed. Reg. 45984, 45985.

[9] Press Release, Sam Jones-Ellard, *USDA Proposes Changes to Beef and Soybean Checkoff Programs,* United States Department of Agriculture Agricultural Marketing Service (July 15, 2016, 9:30 AM), https://www.ams.usda.gov/press-release/usda-proposes-changes-beef-and-soybean-checkoff-programs.

[10] *See generally* 7 U.S.C. § 6304(l).

AMS, a QSSB is required to "redirect" to USB an amount equal to that which would have been refunded to a producer in the event a producer requests a refund pursuant to state law. The issue arises, however, as to whether these state law provisions have any legal effect insofar as they are preempted or superseded by the Soybean Act.

The Soybean Act states that, subject to two exceptions, nothing in the Act "may be construed to . . . preempt or supersede any other program relating to soybean promotion, research, consumer information, or industry information organized and operated under the laws of . . . any State. . . ."[11] The relevant exception to that provision states as follows:

> To ensure adequate funding of the operations of qualified State soybean boards under this chapter, whenever an order is in effect under this chapter, *no State law* or regulation that limits the rate of assessment that the . . . board in that State may collect from producers . . . in such State, or that has the effect of limiting such rate, *may be applied to prohibit such State board from collecting and expending for authorized purposes, assessments from producers of up to the full amount of the credit authorized for producer contributions to qualified State soybean boards*. . . .[12]

In issuing the Soybean Order on July 9, 1991, AMS evidenced that producer refund provisions are preempted by the Soybean Act based on the above-quoted language from the Soybean Act. Specifically, AMS stated in 1991 the following:

> One commenter requested that the Order repeat the preemption language in the Act section 1974(a)(3) and clearly indicate that the Qualified State Soybean Boards can keep ¼ of 1 percent of the net market price. We believe this assurance is contained in several sections of the Order and does not need to be repeated. The suggestion is not adopted.[13]

Additionally, USB publicly espouses that states' producer refund provisions are superseded by federal law. Specifically, the USB website states, in part, that "federal law supersedes the state's research and promotion refund statutes. . . ."[14] Thus, one can plausibly conclude that state producer refund provisions are preempted or superseded by federal law.

A state producer refund provision that is superseded or preempted by the Soybean Act is a law that a producer cannot leverage to request a refund because it is unenforceable or otherwise set aside. For example, Black's

---

[11] 7 U.S.C. § 6309(a).

[12] Id. at § 6309(b)(3) (emphasis added).

[13] Soybean Promotion and Research Order, 56 Fed. Reg. 31043, 31048 (July 9, 1991).

[14] *See, e.g., Exhibit C – Refund Letter from Producer to QSSB,* UNITED SOYBEAN BOARD (2017), http://internal.unitedsoybean.org/compliance_manual/qssb-manual/appendix-l-qssb-refund-letters/exhibit-c-refund-letter-from-producer-to-qssb/ (". . .you will comply with my refund request by remitting the state portion retained by the QSSB to USB ***because the federal law supersedes the state's research and promotion refund statutes*** and there is no federal provision where a producer can receive a refund.") (emphasis added).

Pittman, "*Soybean Checkoff Dollars & USDA 'Redirection': Compatible with Federal Law?*", available at www.nationalaglawcenter.org.

Law Dictionary defines "supersede" as follows: "Obliterate, set aside, annul, replace, make void, inefficacious or useless, repeal. To set aside, render unnecessary, suspend, or stay."[15]

Therefore, this aspect of the redirection proposed rule may be legally impossible to implement because a producer has no legal avenue to request the refund that then triggers "redirection." Stated differently, this aspect of the proposed rule may not even be capable of implementation by producers, QSSBs, USB, or AMS because no soybean producer can request or obtain a producer refund under state or federal law.

C. Redirection Incompatible with Soybean Order?

Redirection contradicts a key provision of the Soybean Order. Specifically, the Soybean Order requires QSSBs to remit to USB "each assessment paid and remitted to it, minus authorized credits issued pursuant to § 1220.223(c) and credits issued to producers pursuant to § 1220.223(a)(3), and other authorized deductions. . . . ."[16] In other words, a QSSB must agree to this provision in order to exist as a QSSB. Redirection, however, requires QSSBs to remit the full assessment to USB rather than the full assessment "minus authorized credits . . . and other authorized deductions." Redirection appears to be in direct conflict with this provision, and, therefore raises the question of whether a QSSB can comply with AMS's redirection policy or proposed rule without violating the Soybean Order.

CONCLUSION

Redirection appears to be incompatible with several aspects of the Soybean Act and Order and otherwise not capable of implementation by AMS. If redirection is permissible as either an AMS policy or a final rule, it is somehow permissible outside the plain language requirements of the Soybean Act and Order. If redirection is not allowed under the Soybean Act or Order, then QSSBs are being compelled to abide by an impermissible policy or rule that causes them to lose funding the QSSBs otherwise would have collected, retained, and expended.[17]

The resolution to this issue is of major significance for at least two reasons. First, it strikes at the heart of the following question regarding the long-term viability and operation of the national soybean research and promotion program: whose money is it anyway? Second, it is imperative to determining whether redirection is a plausible defense to any future legal actions that assert that the administration of a QSSB violates the First Amendment to the United States Constitution because the QSSB is a private entity that collects and expends producers' funds to engage in private speech with which some producers disagree.

---

[15] Black's Law Dictionary 1437 (6th Ed.).

[16] 7 C.F.R. §§ 1220.228(a)(1)(iv), 1220.228(b)(4).

[17] *See* 81 Fed. Reg. 45985, 45987 ("However, the proposed rule could result decreased assessment funds for some QSSBs, depending on whether a State statute is in place, whether refund provisions are included, and whether the producer chooses to exercise the refund provision.").