

# OFF ACT

## SECTION-BY-SECTION SUMMARY

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### Checkoff Reform in the 2023 Farm Bill

#### Introduction

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Farmers, ranchers, and producers of twenty-two commodities are currently mandated to pay [one billion dollars](#) into government checkoff programs each year with the stated purpose of advancing product research and promotion. However, checkoff programs notoriously lack the transparency and oversight that is required of other taxpayer programs, leading to documented cases of abuse which erode producers' trust in the programs.

Supported by more than 60 farm organizations, the Opportunities for Fairness in Farming (OFF) Act (S.557 and H.R.1249) would require greater transparency in how checkoff dollars are spent, create more accountability through auditing, and end conflicts of interest by prohibiting checkoff dollars from being contracted to organizations that lobby. These are the minimum safeguards one would expect from any government program.

**This briefing paper sets out the overwhelming evidence explaining how each provision of the OFF Act would bring about checkoff program reform.**

# THE OPPORTUNITIES FOR FAIRNESS IN FARMING ACT

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**S.557 & H.R.1249**

## **A BILL**

To prohibit certain practices relating to certain commodity promotion programs, to require greater transparency by those programs, and for other purposes.

Sections 1-3 include the Short Title, Definition, and Findings.  
Our analysis begins with Section 4.

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### ***SEC. 4. REQUIREMENTS OF CHECKOFF PROGRAMS.***

*(a) Prohibitions.—*

*(1) IN GENERAL.—Except as provided in paragraph (4), a Board shall not enter into any contract or agreement to carry out checkoff program activities with a party that engages in activities for the purpose of influencing any government policy or action that relates to agriculture.*

## Rationale

Although current law prohibits using checkoff dollars to directly fund lobbying efforts, it does not prohibit checkoff boards from contracting with lobbying organizations and funding their research and promotion projects with checkoff dollars. These lobbying organizations have failed to keep checkoff funds they've received for research and promotion contracts separate from their lobbying efforts. Additionally, these organizations are able to leverage checkoff dollars to build their brand identity and influence, enabling them to further their policy agendas.

In *Johanns v. Livestock Marketing Association*, case No. 03-1164, the Supreme Court of the United States determined checkoff programs are government speech, set and approved by the United States Department of Agriculture (USDA). As such, we believe interest groups and trade organizations that lobby the government should not be allowed to receive these funds through contracts or through other means. In order to restore checkoff program integrity, checkoff boards must be prohibited from sending any checkoff funds to lobbying organizations.

## Example of Current Harm

The National Cattlemen's Beef Association (NCBA) — a lobbying organization — receives the [majority](#) of the checkoff dollars collected from national and state beef checkoff boards annually, totaling \$45 million in 2020. Checkoff dollars account for [70%](#) of NCBA's total budget.

In addition to directly misusing checkoff dollars, NCBA uses its checkoff-funded brand identity to pressure Congress to support its policy agendas — even if these policies go against the best interest of the farmers and ranchers who paid these mandatory checkoff fees.

In 2010, an [independent audit](#) examining the equivalent of just nine days of beef checkoff program spending found that NCBA had improperly spent more than \$200,000 in checkoff funds on lobbying, overseas vacations, and other illicit activities.

It revealed that checkoff funds were spent to specifically lobby against mandatory country of origin labeling (COOL) — legislation that many farmers and ranchers believe would help level the playing field.

NCBA was also a strident critic of the “GIPSA rules.” In 2010, these rules were proposed as a way for the USDA’s Grain Inspection, Packers and Stockyards Administration (GIPSA) to strengthen an agricultural antitrust law. [NCBA joined](#) other groups representing meatpacking corporations in lobbying against these rules — altogether, these agribusiness interests spent [\\$7.79 million](#) on the opposition campaign in 2010.

NCBA includes opposition to the GIPSA rules and COOL in its 2023 policy priorities. When checkoff funds are awarded to groups that lobby against the best interests of those paying into the program, it breaks the trust between farmers and ranchers and the checkoff boards.

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*(2) CONFLICT OF INTEREST.—A Board shall not engage in, and shall prohibit the employees and agents of the Board, acting in their official capacity, from engaging in, any act that may involve a conflict of interest.*

## Rationale

Strict conflict of interest laws are critical to maintaining the trust of the producers who are mandated to pay into checkoff programs, and this must apply to all checkoff board members, their agents, and employees.

There are varying degrees of what constitutes a conflict of interest across checkoff programs. The OFF Act standardizes the definition. In “[Sec. 3. Definitions](#),” the OFF Act defines a conflict of interest as “a direct or indirect financial interest in a person or entity that performs a service for, or enters into a contract or agreement with, a Board for anything of economic value.”

## Example of Current Harm

There is significant operational overlap between many national checkoff boards and trade associations that present conflicts of interest.

Of the twenty-two federally-mandated checkoff boards, eleven have overlapping board members with commodity trade groups; two share offices with commodity trade groups; and two have overlapping staff members with commodity trade groups. Determining the full scope of staff overlap is not possible as seven checkoff boards do not make their staff lists available.<sup>1</sup>

A closer look at the checkoff board and trade association for blueberries — the United States Highbush Blueberry Council (the checkoff program) and North American Blueberry Council (the trade association) — reveals significant operational overlaps between the two. They share two [board members](#), have nearly identical staff ([eleven](#) out of [twelve](#) employees are shared between the two), and even share an office.

Based on the blueberry checkoff program's [2019 audit](#) and the trade association's [2019 IRS 990](#), the checkoff program paid the trade association for “general and administrative expenses” plus an “annual service fee,” which totaled \$1,209,858. This is noted in the trade association's IRS 990 as “contract revenue.”

Meanwhile, the trade association spent nearly [\\$100,000](#) on lobbying in 2019 and is actively lobbying against the OFF Act: They recently joined seventeen other industry trade groups in [signing](#) an opposition letter against the legislation.

With so much operational overlap, there is little evidence of a firewall that would enable each organization to work on behalf of the respective best interests of two distinct entities.

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<sup>1</sup> While smaller checkoff programs may not have staff and only be run by board members, larger checkoff boards like the American Egg Board, the National Dairy Promotion and Research Board, the National Pork Board, as well as large trade associations like NCBA are choosing not to disclose this information to the public.

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*(3) OTHER PROHIBITIONS.—A Board shall not engage in, and shall prohibit the employees and agents of the Board, acting in their official capacity, from engaging in—*

*(A) any anticompetitive activity;*

*(B) any unfair or deceptive act or practice; or*

*(C) any act that may be disparaging to, or in any way negatively portray, another agricultural commodity or product.*

## Rationale

The government should not meddle in the marketplace by picking winners and losers among producers. Even though checkoff programs have been declared government speech by the Supreme Court, checkoff programs continue to engage in anticompetitive behavior, threatening a dynamic and informed free marketplace.

## Example of Current Harm

After Senator Mike Lee called for an investigation by the USDA based on information obtained through a FOIA request, the [agency's report](#) revealed that in 2015 the national checkoff board for eggs, the American Egg Board, engaged in a months-long campaign disparaging a competing product: a plant-based mayo from a new start-up company. Records show the Board even held discussions with a consultant to prevent Whole Foods from stocking the rival company's product.

The USDA's report concluded that the Board violated federal guidelines by not submitting budgeting documents for the project to the USDA for review, and the American Egg Board CEO resigned over the matter. However, this information only came to light because of a FOIA request. There must be strict laws prohibiting this market abuse in the first place and regular oversight to swiftly identify illegal behavior.

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*(4) EXCEPTION FOR CERTAIN CONTRACTS WITH INSTITUTIONS OF HIGHER EDUCATION.—Paragraph (1) shall not apply to a contract or agreement entered into between a Board and an institution of higher education for the purpose of research, extension, and education.*

## Rationale

Institutions of higher education, including our land grant institutions, provide critical agricultural research but do not engage in the marketing and promotion of commodities. Further, while these institutions may lobby for their own growth and benefit, they do not directly lobby for agricultural policy.

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*(b) Authority To Enter Into Contracts.—Notwithstanding any other provision of law, on approval of the Secretary, a Board may enter directly into contracts and agreements to carry out generic promotion, research, or other activities authorized by law.*

## Rationale

Passing checkoff funds through other organizations adds an unnecessary layer of administrative burden and costs to the program, further scatters the flow of checkoff funds and makes them harder to track, and creates opportunities for lobbying organizations to influence projects based on their members' interests. This OFF Act provision allows checkoff programs to enter directly into contracts and agreements to carry out promotion, research, and other checkoff activities.

## Example of Current Harm

Currently, the Cattlemen's Beef Board is [required by statute](#) to contract services through other organizations.

Sec. 5 (6) of the Beef Act states: "The order shall provide that, to ensure coordination and efficient use of funds, the committee shall enter into contracts or agreements for implementing and carrying out the activities authorized by this Act with established national nonprofit industry-governed organizations, including the federation referred to in paragraph (4), to implement programs of promotion, research, consumer information, and industry information."

Based on Farm Action Fund's research, four other checkoff programs currently appear to require their boards to contract with intermediary producer organizations.

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### *(c) Production Of Records.—*

*(1) IN GENERAL.—Each contract or agreement of a checkoff program shall provide that the entity that enters into the contract or agreement shall produce to the Board accurate records that account for all funds received under the contract or agreement, including any goods or services provided or costs incurred in connection with the contract or agreement.*

*(2) MAINTENANCE OF RECORDS.—A Board shall maintain any records received under paragraph (1).*

### *(d) Publication Of Budgets And Disbursements.—*

*(1) IN GENERAL.—The Board shall publish and make available for public inspection all budgets and disbursements of funds entrusted to the Board that are approved by the Secretary, immediately on approval by the Secretary.*



*(2) REQUIRED DISCLOSURES.—In carrying out paragraph (1), the Board shall disclose—*

*(A) the amount of the disbursement;*

*(B) the purpose of the disbursement, including the activities to be funded by the disbursement;*

*(C) the identity of the recipient of the disbursement; and*

*(D) the identity of any other parties that may receive the disbursed funds, including any contracts or subcontractors of the recipient of the disbursement.*

## Rationale

Farmers and ranchers have a right to know exactly how their government-mandated fees are spent, including which organizations receive contracts and how much each project receives. The majority of checkoff boards and trade associations have thus far failed to disclose this information to the public.

## Example of Current Harm

Based on our analysis of the twenty-two checkoff boards, only six checkoff boards have information available on their websites indicating which organizations receive contracts and how much money is awarded — and most of these only include this information for research projects.

The majority of checkoff boards only make budget summaries publicly available, which show just a handful of vague line items.

For example, the National Honey Board's publicly-available budget only includes three line items for expenditures. The budget line for marketing and promoting amounts to more than seven million dollars and does not disclose information about who receives the money.

The Cattlemen’s Beef Board is the only checkoff program that makes its detailed project funding information available to the public, including project contractors, budgets, and proposals.

The Avocado Board’s monthly check registers help provide some transparency for the flow of money, but the information includes a significant number of redacted line items. The peanut, sorghum, Christmas tree, and soybean boards offer information only on research projects they have funded, including the name of the grantee, the dollar amount, and the research topic.

The flow of checkoff dollars is not easily traced by looking at trade associations’ IRS 990 forms either. The majority of trade associations do not clearly state how many checkoff dollars they’ve received, though NCBA and the National Christmas Tree Association are two exceptions.

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*(e) Audits.—*

*(1) PERIODIC AUDITS BY INSPECTOR GENERAL OF USDA.—*

*(A) IN GENERAL.—Not later than 2 years after the date of enactment of this Act, and not less frequently than every 5 years thereafter, the Inspector General of the Department of Agriculture shall conduct an audit to determine the compliance of each checkoff program with this section during the period of time covered by the audit.*

*(B) REVIEW OF RECORDS.—An audit conducted under subparagraph (A) shall include a review of any records produced to the Board under subsection (c)(1).*

*(C) SUBMISSION OF REPORTS.—On completion of each audit under subparagraph (A), the Inspector General of the Department of Agriculture shall—*

*(i) prepare a report describing the audit; and*

*(ii) submit the report described in clause (i) to—*

*(I) the appropriate committees of Congress, including the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary of the Senate; and*

*(II) the Comptroller General of the United States.*

*(2) AUDIT BY COMPTROLLER GENERAL.—*

*(A) IN GENERAL.—Not earlier than 3 years, and not later than 5 years, after the date of enactment of this Act, the Comptroller General of the United States shall—*

*(i) conduct an audit to assess—*

*(I) the status of actions taken for each checkoff program to ensure compliance with this section; and*

*(II) the extent to which actions described in subclause (I) have improved the integrity of a checkoff program; and*

*(ii) prepare a report describing the audit conducted under clause (i), including any recommendations for—*

*(I) strengthening the effect of actions described in clause (i)(I);*

*(II) improving Federal legislation relating to checkoff programs.*

*(B) CONSIDERATION OF INSPECTOR GENERAL REPORTS.—The Comptroller General of the United States shall consider reports described in paragraph (1)(C) in preparing any recommendations in the report under subparagraph (A)(ii).*

## Rationale

Currently checkoff fund audits are based on information the checkoff boards themselves provide to the auditor and not based on financial data independently reviewed and obtained by the auditor. This low-level financial auditing begs the following questions: Were the checkoff funds expended in compliance with the law, who received the funds, and how were those funds spent? Compliance, performance, and detailed financial audits are a must to ensure government-mandated funds are being spent to fulfill the programs' original intent.

Further, requiring a one-time compliance audit of the OFF Act itself by the Comptroller General of the United States completes the auditing required to restore trust in the checkoff programs.

## Example of Current Harm

The American Egg Board's [2022 audit](#) states: "We have audited the accompanying financial statements of the financial position...Management [the Board] is responsible for the preparation and fair presentation of the financial statements in accordance with accounting principles generally accepted in the United States of America...However, providing an opinion on compliance with those provisions [laws, regulations, contracts, and grant agreements] was not an objective of our audit and accordingly, we do not express such an opinion." We found that audits of other checkoff boards use similar language.