

ONE HUNDRED FOURTEENTH CONGRESS
Congress of the United States
House of Representatives
 COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

July 8, 2015

To: Subcommittee on Commerce, Manufacturing, and Trade Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on “H.R. 985, Concrete Masonry Products Research, Education, and Promotion Act of 2015”

On Friday, July 10, 2015, at 9:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Commerce, Manufacturing, and Trade will hold a legislative hearing titled “H.R. 985, the Concrete Masonry Products Research, Education, and Promotion Act of 2015.”

I. BACKGROUND

Concrete masonry products are made from concrete mixtures placed into molds, vibrated and compacted, and quickly removed from the molds.¹ These products are commonly seen in the form of 8 x 8 x 16-inch blocks (also called concrete blocks).² The Congressional Budget Office estimates that approximately 1.4 billion concrete blocks and pavers are sold every year.³

¹ Portland Cement Association, *Concrete Masonry Units* (online at www.cement.org/think-harder-concrete-/homes/building-systems/concrete-masonry-units) (accessed June 30, 2015).

² *Id.* Concrete masonry products as defined in the bill are distinct from ready mixed concrete products that are delivered by a revolving mixer or agitator truck. Some members of the ready mixed concrete industry have been advocating for their own check-off program to promote ready mixed concrete. See RMC Check-off Initiative (www.rmcheckoff.org/Default.html) (accessed June 8, 2015).

³ Congressional Budget Office, *S. 429: Concrete Masonry Products Research, Education, and Promotion Act of 2013* (June 17, 2014) (online at www.cbo.gov/sites/default/files/s429.pdf).

Research and promotion programs, also known as assessment or check-off programs, are intended to benefit individual industries or commodities.⁴ They generally involve a central board or committee that collects assessments from individual firms within a particular industry.⁵ The boards use the collected funds to promote the industry or commodity as a whole.⁶ These programs have been implemented most frequently in the agricultural sector, where generic commodity-wide marketing is traditionally perceived to be most effective due to the difficulty of establishing meaningful distinctions among basic agricultural products grown by different entities.⁷ The well-known “Got Milk?” and “Beef: It’s What’s For Dinner” advertising campaigns are prominent examples of agriculture consumer education efforts funded by check-off programs.

While many industry trade associations charge a fee for membership, membership is voluntary. Check-off programs created by Congress often impose mandatory assessments on program their members. Membership is mandatory, based solely on the fact that the member produces the product in the program.⁸ Supporters of check-off programs assert that mandatory assessments for check-off programs address the problem of “free-riding,” in which some industry participants enjoy the benefits of industry-wide improvements without sharing in the associated costs.⁹

II. EXISTING RESEARCH AND PROMOTION PROGRAMS

Various programs at the federal level have been established by Congress to promote certain commodities.¹⁰ Until 1996, Congress passed individual measures to promote specific agricultural commodities.¹¹ Congressional action has not been needed to establish new agricultural check-off programs since passage of the 1996 Farm Bill, which gave U.S.

⁴ U.S. Department of Agriculture, *Federal Research and Promotion Programs* (Dec. 17, 2014) (online at www.ams.usda.gov/AMSv1.0/ams.fetchTemplateData.do?template=TemplateB&leftNav=ResearchandPromotion&page=ResearchandPromotion).

⁵ *Id.*

⁶ *Id.*

⁷ Congressional Research Service, *Mandatory Fees for Commodity Promotion Spread Far from the Farm* (June 16, 2014) (IN10061); Congressional Research Service, *Federal Farm Promotion (“Check-Off”) Programs* (Oct. 20, 2008) (95-353).

⁸ Congressional Research Service, *Mandatory Fees for Commodity Promotion Spread Far from the Farm* (June 16, 2014) (IN10061).

⁹ *Id.*

¹⁰ Numerous checkoff programs exist at the state and regional level as well.

¹¹ These measures established assessments for commodities including cotton, potatoes, eggs, beef, dairy products, honey, pork, watermelons, soybeans, fluid milk, mushrooms, fresh-cut flowers and greens, and sheep products. Congressional Research Service, *Federal Farm Promotion (“Check-Off”) Programs* (Oct. 20, 2008) (95-353).

Department of Agriculture (USDA) direct authority to establish check-off programs for agricultural commodities.¹²

The most recent agricultural check-off programs working their way through the USDA process are for hardwood lumber/plywood and Christmas trees; although the Christmas tree program until recently had been stalled.¹³ The 2014 Farm Bill included a provision directing USDA to proceed with a check-off program for fresh-cut Christmas trees.¹⁴ The program became effective in April 2014, and members were appointed to the Christmas Tree Promotion Board in January 2015.¹⁵ In addition to hardwood and Christmas trees, there was an effort in Congress in 2013 to designate “natural stone” as an agricultural commodity, which would have allowed the industry to petition USDA for the creation of a natural stone check-off program, but that effort ultimately failed.¹⁶

Congress has passed two non-agriculture check-off programs, which are run primarily through Department of Energy (DOE): the Propane Education and Research Council (PERC) and the National Oilheat Research Alliance (NORA).¹⁷ Because neither of the two is a research and promotional program for agricultural commodities, Congressional action was required to establish them.

In a 2010 report on PERC and NORA, the U.S. Government Accountability Office (GAO) registered several concerns about the operation of the programs.¹⁸ The report noted that meaningful government oversight of the programs was limited, and that DOE had not exercised oversight authority over either PERC or NORA.¹⁹ Despite explicit statutory language assigning

¹² *Id.*

¹³ U.S. Department of Agriculture, *Hardwood Lumber and Hardwood Plywood Promotion, Research and Information Order*, 78 FR 68297 (Nov. 13, 2013) (proposed rule); U.S. Department of Agriculture, *Christmas Tree Research and Promotion Order* (Jan. 15, 2015) (online at www.ams.usda.gov/AMSV1.0/FVResearchandPromotionChristmasTrees). A checkoff program for softwood was created in 2011. *See* Note 8.

¹⁴ Agriculture Act of 2014, Pub. L. No. 113-79 (2014).

¹⁵ U.S. Department of Agriculture, *Christmas Tree Research and Promotion Order* (Jan. 15, 2015) (online at www.ams.usda.gov/AMSV1.0/FVResearchandPromotionChristmasTrees).

¹⁶ U.S. House of Representatives, Roll Call Vote on Agreeing to H.Amdt.219 (June 20, 2013) (215 yeas, 211 nays); Agriculture Act of 2014, Pub. L. No. 113-79 (2013).

¹⁷ Government Accountability Office, *Propane and Heating Oil: Federal Oversight of the Propane Education and Research Council and National Oilheat Research Alliance Should Be Strengthened* (June 2010) (GAO-10-583). *See also* Government Accountability Office, *Propane and Heating Oil: Federal Oversight of the Propane Education and Research Council and National Oilheat Research Alliance Should Be Strengthened* (Sept. 29, 2010) (GAO-10-918T).

¹⁸ *Id.*

¹⁹ *Id.*

certain oversight responsibilities to DOE, the Department claimed it had no oversight role regarding either program.²⁰

According to the GAO report, PERC and NORA spent more than half of total assessment funds on consumer education programs. Although the legislative history of both authorizing statutes suggests that obtaining funding for research and development and safety and training was a key factor when the legislation was passed, far fewer assessment funds were spent for those purposes.²¹

In the report, GAO also noted that the authorizing statutes for both PERC and NORA were unclear with regard to the programs' political activity. GAO commented that although both laws prohibited the use of assessment funds for influencing legislation or elections, both programs spent funds on a range of activities that were political in nature that may or may not be covered by the language of the acts.²²

The GAO report ultimately offered three recommendations to Congress with regard to improving the NORA and PERC programs. It recommended that Congress specify and prioritize the activities these check-off programs are expected to undertake, and describe with specificity the activities that are prohibited. To improve oversight over PERC and NORA, GAO recommended that the activities of their respective boards should also be subject to independent review, interpretation, and approval by a clearly designated entity, which should have further authority to oversee and enforce the prohibitions of the use of assessment funds for lobbying purposes. Finally, Congress should establish an enforcement mechanism, such as penalties for noncompliance, and an appropriate enforcement process.²³

Although NORA expired in 2010, it was reauthorized for five years as part of the 2014 Farm Bill.²⁴ The reauthorization incorporated a number of changes to address GAO's recommendations.²⁵ PERC does not expire, so no reauthorization is required.²⁶ GAO's recommendations regarding the PERC program have not been addressed through legislation or regulation.

III. H.R. 985, THE CONCRETE MASONRY PRODUCTS RESEARCH, EDUCATION, AND PROMOTION ACT OF 2015

H.R. 985 was introduced by Rep. Brett Guthrie on February 13, 2015. The stated purpose of the bill is to strengthen the position of the concrete masonry industry, develop and

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *See* Note 14.

²⁵ *Id.*

²⁶ *See* Note 17.

expand markets and uses of concrete masonry products in both foreign and domestic markets, and promote the use of concrete masonry products in environmentally sustainable construction.

A. Establishment of the Concrete Masonry Products Board

The bill directs the Secretary of Commerce to prepare an order establishing a Concrete Masonry Products Board to carry out a program of generic promotion, research, and education relating to concrete masonry products. Promotion is defined as actions to advance the image and desirability of masonry products with the express intent of improving the competitive position of masonry products in the marketplace. Education is defined as programs to communicate any environmental benefits and advancements in concrete masonry technology and which are designed to generate increased demand for projects using concrete masonry products. Research is defined as studies testing the effectiveness of the promotion efforts as well as studies relating to improvement of the products and testing the performance of the products.

The proposed order establishing the Board and check-off program will be open for public comment before the order is finalized. The final order will only become effective if it is approved by a simple majority of the votes cast in an industry referendum. The number of votes allowed for each manufacturer is based on the size of the manufacturers operation, with each manufacturer entitled to one vote per mold it has actively available to make a single concrete block.²⁷

The Board, which may have up to 25 members, must be made up of concrete masonry manufacturers reflecting geographic and product diversity within the industry. Board members are appointed by the Secretary of Commerce from nominations submitted by manufacturers. Two nominees will be submitted for each available board position through a nomination procedure to be established by the order. Board members will not be paid for their service, but may receive reimbursement for travel expenses for occasions on which they are away from home to perform services for the Board.

B. Assessments on Check-off Program Members

H.R. 985 sets the initial rate of assessment for the check-off at \$0.01 per concrete masonry unit sold, but the rate may be changed by a two-thirds majority of voting members of the Board. The assessment rate under this program is capped at \$0.05 per unit sold. At least 50% of the assessments paid by a manufacturer must be spent on promotion, research, or education programs in that manufacturer's geographic area. In addition, the statute prohibits the use of assessment funds to influence legislation or governmental action. Beginning three years after the program's creation, administrative expenses cannot exceed 10% of the Board's income.

C. Oversight and Enforcement

²⁷ Concrete block machines may include more than one single-block mold, meaning that one machine can make more than one block at a time. Most manufacturers will get more than one vote, with larger companies getting a larger number of votes.

The bill provides for oversight of the activities of the Board by the Secretary of Commerce. The Board's budget must be submitted to the Secretary of Commerce for approval at least once per year. At the end of each fiscal year, the Board's records must be audited by an independent auditor. All research, education, and promotion projects and all contacts entered into by the Board to carry out those projects must be approved by the Secretary.

The order, including the collection of assessments and all Board activities, may be suspended or terminated by a majority of all votes cast in an industry referendum, which may be conducted at least five years after the approval of the original order or at five-year intervals thereafter. Any such subsequent referenda will only occur at the request of 25 percent or more of the number of manufacturers eligible to vote.

The bill allows any manufacturer subject to an order to petition for review of an order and requires the petitioner have an opportunity for a hearing on the petition. The petitioner may appeal the Secretary's ruling in U.S. district court. The Secretary must suspend or terminate any order or provision that obstructs or does not tend to effectuate the purposes of this Act.

The bill also provides that a U.S. district court will have jurisdiction to enforce, prevent, and restrain any person from violating the Act or an order or regulation issued under the Act. And it authorizes the Secretary of Commerce to assess a fine of up to \$5,000 on a person for each willful violation of an order or regulation issued under the statute. The Secretary may conduct appropriate investigations necessary to administer this Act.

IV. WITNESSES

The following witnesses have been invited to testify:

Panel I

Franklin Rusco

Director, Natural Resources and Environment
Government Accountability Office

Ellen Herbst

Chief Financial Officer and Assistant Secretary for Administration
U.S. Department of Commerce

Panel II

Major Ogilvie

General Manager
Ready Mix USA, LLC

Kent Waide

President
Ruby Concrete Company

Kate Offringa
President
Vinyl Siding Institute, Inc.