
**Agriculture & Ecology
Committee**

HB 2688

Brief Description: Regulating commodity boards and commissions.

Sponsors: Representative Linville; by request of Department of Agriculture.

Brief Summary of Bill

- Declares the regulation of commodity producers under various commodity boards and commissions to be only one aspect of the comprehensive regulation of the industry involved.
- Provides alternatives for appointing members of certain commodity boards and commissions.
- Exempts referendum approved rules from certain rule-making requirements for certain commodity boards and commissions and exempts certain records from public disclosure.
- Provides for the payment of certain costs of the Department of Agriculture by commodity boards and commissions.
- Allows the members and employees of certain commodity boards and commissions to be reimbursed for their actual travel expenses.
- Alters the statutory levels of certain commodity commission assessments.
- Grants certain commissions subpoena authorities and prescribes liability limitations for members and employees of certain commissions and for the Fruit Commission
- Provides procedures for terminating or suspending a board or commission created under the Agricultural Enabling Acts and alters other provisions of the acts.

Hearing Date: 2/1/02

Staff: Kenneth Hirst (786-7105).

Background: *United States et al. v. United Foods, Inc.* (121 S Ct. 2334 (2001)) was

decided by the U. S. Supreme Court in June 2001. In its decision, the court declared a mandatory assessment on mushrooms for a federal promotional program to be an unconstitutional infringement on free speech. Although the Supreme Court upheld a commodity assessment in *Glickman v. Wileman Brothers & Elliott, Inc.* in 1997, in its 2001 decision, the Court noted important differences between this case and the *Glickman* case. For example, the Court stated:

"The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman*, the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal objective of the regulatory scheme." (121 S CT.2334, et page 2338).

Some agricultural commodity commissions have been created directly by statute. Examples these type of commodity commissions are the Fruit Commission, Tree Fruit Research Commission, Apple Advertising Commission, Beef Commission, and Dairy Products Commission. (Chapters 15.28, 15.24, 15.26, 15.44, and 16.67 RCW.) The state's Agricultural Enabling Acts of 1955 and 1961 provide procedures under which the producers of agricultural commodities may prepare marketing agreements and orders to create, by referenda, agricultural commodity boards and commissions for the commodities without further statutory authority. (Chapters 15.65 and 15.66 RCW.) The first commission created in this way was the Wheat Commission, which was established under the 1955 Enabling Act. (Chapter 16-528 WAC.)

In 2001, members of commodity boards and commissions created under the Enabling Acts were authorized to receive reimbursement of their actual travel expenses if the board or commission adopts a rule providing that reimbursement. If the board or commission does not, the reimbursement is as provided for other state employees. (Chapter 6, Laws of 2001 2nd Sp. Sess.)

Summary of Bill:

Summary: I. Commodity Commissions Generally.

Commodity Board Regulation - Part of Overall Regulation.

The statements of purpose for the 1955 and 1961 Agricultural Enabling Acts are altered. They state that farmers and ranchers operate within a regulatory environment that imposes burdens, including those that impair the producer's ability to compete in local domestic, and foreign markets and it is in the overriding public interest that each agricultural commodity be promoted individually and as part of a comprehensive industry. The Director of Agriculture is authorized to implement and administer the 1955 and 1961 Acts through the establishment of commodity commissions. (Sec. 2 and 38.) The Enabling Acts and their rules are only one aspect of the comprehensively regulated agricultural industry. A number of state and federal laws and rules are cited as being regulatory restraints on the industry. (Sec. 3 and 41.)

The statements of purpose for the Beef Commission, Dairy Products Commission, and Fruit Commission are similarly altered. In addition to the being regulated under the statutes of

these commissions, a number of federal and state statutes and programs and federal marketing orders are cited as being regulatory restraints on the industry. (Sec. 79, 87, and 103.) The Director may consult with commodity commissions to establish or maintain an integrated, comprehensive regulatory scheme. (Sec. 111.)

Electronic Notices; Lists. Under the Agricultural Enabling Acts and the statutes creating the Beef, Dairy Products, and Fruit Commissions, mailing or sending required notices includes sending them electronically. (Sec. 1, 80, 88 and 104.) Provisions regarding compiling, maintaining, and certifying lists of affected parties for referenda and other purposes, and the responsibilities for providing information for the lists, are altered or clarified for boards and commission created under the Enabling Acts and for the Dairy Products Commission. (Sec. 1, 17, 45, 29, 30, 39, 57, 58 and 90.)

Adopting Rules Determined by Referenda. When the adoption of rules by the Beef, Dairy Products, or Fruit Commission or a commission or board created under the Enabling Acts is determined by a referendum of affected parties, the rule-making is exempt from the provisions of the Administrative Procedure Act regarding pre-notice statements of inquiry and negotiated and pilot rule-making and from the Regulatory Fairness Act (including the preparation of small business economic impact statements). (Sec. 36, 43, 82, 94 and 109.)

Funding for the Department. The Director may adopt rules that provide for a method to fund: the costs of staff support for all commodity commissions if the position is not directly funded by the Legislature; and costs related to the specific activity undertaken on behalf of an individual commission. The staff support must be limited to full time equivalent employee for all commodity commissions. The Director may adopt rules for carrying out the Director's duties under the Enabling Acts. (Sec. 7(1), 44, 61, 64 and 72 through 77 and 78.)

The Beef and Dairy Products Commissions must reimburse the Director for costs of services conducted for the commission and may enter agreements with the Director to administer the commission laws or the Administrative Procedure Act. (Sec. 86 and 91.)

Travel Reimbursement. Members of the Beef, Dairy Products, or Wine Commission and its employees are to be reimbursed for actual travel expenses for official business as defined by the commission by rule. If not defined by rule, the reimbursement is as established by law for state employees. (Sec. 81, 92 and 110.)

Public Disclosure of Certain Records.

The agricultural business records exempt from public disclosure include: the production or sales records required by the Department to administer any of its programs; and financial and commercial information supplied to the Department for the purposes of conducting a referendum to establish a commodity commission or with respect to marketing activities or individual producer's production information. (Sec. 66.) Although certain business and records of commodity boards and commissions are exempt from public disclosure under the public disclosure laws, certain records may be shared between the department and a board or commission and may be used in certain suits or administrative hearings. The Enabling Acts and the statutes for the Tree Fruit Research Commission, Fruit Commission, Dairy Products Commission, Wine Commission, and Beef Commission do not prohibit the issuance of

general statements based upon the confidential information that does not identify the information provided by any one person or the publication of the name of a person violating a marketing order or agreement and a violation statement. (Sec. 18, 50, and 67 through 71.)

II. Boards and Commissions Created under the 1955 and 1961 Enabling Acts.

A marketing order under the 1961 Enabling Act may be one for agricultural commodities with like or common qualities or producers. Referenda under the 1955 and 1961 Acts are votes of affected parties conducted by secret ballot. Under these acts, lists of affected entities may include, if requested by the Director, the amount by unit of the affected commodity produced or handled during a designated period. For this purpose, a production period is either a minimum three-year period or as specified in a marketing order or agreement. (Sec. 1 and 39.) The research studies regarding efficiencies in the industry that may be provided by a commodity board or commission under the Enabling Acts are altered. (Sec. 4, 29 and 57.)

Board or Commission Membership. A marketing order or agreement may permit the Director to appoint a majority of the members of a board or commission, with certain statutorily provided procedures and guidance. Two options are established for providing those procedures and guidance. However, not less than one-third of board or commission members must be elected by affected producers. (Sec. 20, 24, 25, 51, 52, and 53.) If there is a vacancy in a Director appointed position, the remaining board or commission members must recommend a qualified person for the appointment and the Director must appoint the person recommended unless he or she fails to meet the qualifications of board or commission members listed the marketing order and its Enabling Act. (Sec. 28 and 54.) Each handler member of a board must be at least 18 years old (rather than 25). (Sec. 21.) The definition of "person" is expanded and no more than one board member may be part of one such "person." (Sec. 1, 26, 39, and 51.) The Director is a member of a commission created under the 1955 Act unless otherwise specified in the commission's marketing order. (Sec 51.) Under the 1955 Act, a majority of the voting members of a commission constitutes a quorum. (Sec. 56.)

Amending a Marketing Order or Agreement. A commodity board expressly may petition the Director to issue or amend a marketing order or agreement. (Sec. 5.) The Director may adopt amendments to marketing agreements or orders under the Enabling Acts without conducting a referendum if the proposed amendments: relate only to internal administration of a marketing order or agreement and are not subject to violation by a person; or adopt or incorporate by reference without material change state or federal statutes or rules and the material regulates the same activities as are authorized under the marketing order. The Director may also adopt such amendments without a referendum if the content of the amendments is explicitly and specifically dictated by statute. (Sec. 7(2), 13 and 43.)

Terminating or Suspending an Order or Agreement. Procedures and conditions for terminating a marketing order or agreement are specified. (Sec. 14.) If the referendum to terminate is affirmed by referendum, the Director must adopt the termination. If it is not affirmed, the Director is to take no further action on the referendum. The records of the referendum must be kept in the Director's rule-making file. Inadvertent failure to notify an affected producer does not invalidate the referendum. If petitioned by 100% of the affected

producers to terminate a marketing order or agreement, the Director may terminate it without conducting a referendum at the end of the marketing season. (Sec. 15.) Requirements are modified for settling the business of a terminated commodity board and for transferring files to the department. (Sec. 16, 34, and 60.) The Director is not required to hold a hearing or referendum more than once in 12 months on petitions to issue, amend, or terminate a commodity board or commission if the action requested is similar to certain others. (Sec. 12 and 49.) The Director may, upon the request of a commodity commission, suspend the commission's order or the term or provision of an order for a period of not to exceed one year, if the Director finds that the suspension will tend to effectuate the declared policy of the 1955 Act. The Director may do so without complying with hearing and referendum requirements. Such a suspension of substantially all of a marketing order is not effective until the end of the current marketing season. (Sec. 48.)

Tallying Referenda Results. Requirements are established for tallying the results of referenda, providing the results to affected parties and disputing those results. After all matters are resolved and finalized, the individual ballots may be destroyed. (Sec. 19 and 55.) Notice procedures for conducting hearings on proposals to issue, amend, or terminate a marketing order and for proposing the issuance of a marketing order under the 1955 Act are altered. (Sec. 45 and 46.)

Other. The Director may also adopt rules for carrying out the Director's duties under the Enabling Acts. (Sec. 7(1) and 44.) A commodity board or commission must reimburse the Director for costs incurred in administering the act and for costs when the board petitions the Director to amend or terminate a marketing order. Provisions regarding reimbursing other petitioners are altered. (Sec 35 and 42.)

The funds of commissions may also be invested in savings or time deposits of financial institutions out-of-state, rather than only those in-state. (Sec. 62.)

Repealed are statutes that: provide general statements of legislative intent for the Enabling Acts; allow hearings and permit an administrative law judge to preside over inquiries or investigations under the 1961 Act; create a Marketing Act Revolving Fund and require all income received under the 1961 Act to be deposited in the Fund; and allow the hop and mint commodity boards to raise assessments to specified levels in excess of the fiscal growth factor.

III. Beef Commission.

The Beef Commission's assessment on the sale of cattle is increased to \$1/head (from 50/head). (Sec. 83.) The additional assessment allowed for cattle subject to assessment under federal order for national beef promotion and research program is decreased to 50/head (from \$1/head). (Sec. 84.)

The commission may subpoena witnesses and issue subpoenas for the production of records for the purpose of enforcing the beef commission laws. (Sec. 85.)

IV. Dairy Products Commission. The Dairy Products Commission is authorized to retain the services of private legal counsel to conduct legal actions on behalf of a commission or board. The retention is subject to review by the office of the Attorney General. The

commission is also authorized to: establish foundations using commission funds as grant money when the foundation benefits the dairy products industry; accept and expend or retain gifts, bequests, contributions, or grants to carry out the purposes of the commission's statutes; engage in appropriate fund-raising activities to support activities of the commission or board; expend funds for commodity-related education, training, and leadership programs; and work cooperatively with other agencies, universities, and other organizations. (Sec. 93 and 100.) Rather than conducting "advertising," the commission is authorized to take actions that "build demand." (Sec. 93.)

The statutory minimum for the commission's milk assessment is altered. It is either 0.75% of the Class I price for whole milk or, while the federal Dairy and Tobacco Adjustment Act's dairy promotion program is in effect, it is the combination of: .00625 per hundredweight, and an assessment rate not exceeding the rate approved at the last referendum that would achieve 10/hundredweight credit to local, state, or regional promotional organizations under the Act. (Sec. 95.) The authorized educational use of the commission's assessment on Class II milk is altered. (Sec. 96.)

The commission may subpoena witnesses and issue subpoenas for the production of records for the purpose of enforcing the beef commission laws. (Sec. 97 and 98.)

A member of the commission's board may be a member or office of an association with the same purpose as the commission and the commission may contract with the association for services. (Sec. 101.) The extent of the waiver of liability currently provided for the state and for actions of board members and employees of the commission is clarified. (Sec. 102.)

V. Fruit Commission.

The Fruit Commission's assessments are due upon receipt of an invoice for them. The assessments are the personal debt of the person assessed or who owes the assessment. The commission may add up to 10% of the amount of delinquent assessment to defray the costs of collection. The Department must withhold inspection services under the grades and packs statutes from a delinquent party. (Sec. 108.)

In a civil or criminal action or proceeding for a violation of any prohibitions against monopolies or combinations in restraint of trade, including any action under the state's consumer protection laws, proof that the act complained of was done in compliance with and in furthering the purposes of the Fruit Commissions statutes is a complete defense to the action or proceeding. (Sec. 107.)

The commission may serve as an advisory committee to the Director regarding the adoption of rules on grading, packing, and size and dimensions of containers for soft tree fruit and setting the grades of soft tree fruit and issuing certificates of inspection. (Sec. 106.)

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect July 1, 2002.