

Answers to Frequently Asked Questions Concerning *Resolute Forest Products, Inc. v. USDA*

Background:

The Softwood Lumber Research, Promotion, Consumer Education and Industry Information Order (Order or checkoff) was implemented in August 2011, with assessment collection starting in January 2012. In October 2011, Resolute Forest Products, Inc. (Resolute) filed an administrative petition under section 519(a) of the Commodity Promotion Research and Information Act of 1996 (1996 Act) challenging the program. Resolute argued that USDA violated the Administrative Procedure Act (APA) when it promulgated the program. Resolute also argued that the 1996 Act was unconstitutional.

A USDA administrative law judge ruled in favor of USDA in April 2014. Resolute appealed the decision to USDA's Judicial Officer, who ruled in favor of USDA in November 2014. Resolute appealed to federal district court in December 2014. The court issued a decision in September 2015, finding in favor of USDA on five of six APA challenges, and requesting additional information on one APA issue concerning the rationale for the 15 million board foot (mmbf) exemption threshold under the program. Additional information was provided to the court on two occasions. In May 2016, the district court issued a decision finding that, on the basis of the estimates and information reviewed, the selection of 15 mmbf as the de minimis quantity to be exempted was arbitrary and capricious and that the checkoff order was therefore promulgated unlawfully.

A hearing was held in June 2016 to discuss remedies. Briefs were subsequently filed by the government and Resolute. On November 30, 2016, the district court issued a decision to remand the case back to USDA and direct the Secretary of Agriculture to issue Resolute a full refund of its assessments paid under the softwood lumber program. USDA has directed the Board to issue the refund to Resolute.

USDA's Agricultural Marketing Service (AMS) continues its work on an analysis to determine the appropriate de minimis exemption threshold for the softwood lumber research and promotion program. AMS plans to complete this analysis shortly and anticipates publishing it in the *Federal Register* for public comment this spring. During this time, all program obligations, including the collection of assessments and filing of reports, shall remain in effect.

Questions:

What are Research and Promotion Programs?

Research and promotion programs are industry-funded and date back to 1966. Since then, more than 20 research and promotion programs have been implemented. These programs empower stakeholders to leverage their own resources to develop new markets, strengthen existing markets, and conduct important research and promotion activities. AMS provides oversight, helping to ensure fiscal responsibility and program integrity. AMS continues to believe that these programs, including the softwood lumber program, are useful tools for the agricultural community.

What does the Softwood Lumber Board do?

The Board administers the softwood lumber checkoff. Under the program, assessments are collected from U.S. manufacturers (sawmills) and importers and used for projects designed to increase the demand for softwood lumber within the United States. The Board promotes market growth for softwood lumber products used in single and multi-family dwellings as well as commercial construction.

What is the status of the checkoff? Has it been terminated?

The court did not terminate the program, so the softwood lumber checkoff is in effect. The program will continue “status quo,” including utilization of the 15 mmbf exemption threshold, while USDA works towards a rulemaking remedy on the exemption threshold.

Does Resolute have to pay assessments anymore?

USDA (and the Board) have been enjoined by the court from collecting further assessments from Resolute under the current order and must issue a full refund to Resolute for the assessments it has paid into the program. Once USDA completes the rulemaking on the exemption threshold, all companies that ship or import over the exemption threshold will be expected to pay assessments.

Must my company continue to pay assessments?

Yes, the court did not vacate the checkoff order. All program obligations remain in effect.

Why do I have to pay assessments when Resolute does not have to pay?

The court order only applies to Resolute. Once USDA completes the rulemaking on the exemption threshold, all companies that ship or import over the exemption threshold will be expected to pay assessments.

Don't you think it is unfair for everyone else to have to pay assessments and not Resolute?

It is certainly USDA's and the Board's intent that research and promotion programs be equitably administered. USDA is proceeding with rulemaking to remedy the softwood lumber program as expeditiously as possible so that all companies shipping or importing over a certain threshold pay their fair portion of assessments.

Can the Softwood Lumber Board continue to fund programs?

Yes, the Board may continue to fund programs. The checkoff will continue "status quo," including utilization of the 15 mmbf exemption threshold, while USDA works towards a rulemaking remedy on the exemption threshold.

Do small companies that ship or import under 15 million board feet per year now have to pay assessments?

No. The program will continue "status quo," including utilization of the 15 mmbf exemption threshold, while USDA works towards a rulemaking remedy on the exemption threshold. Small companies who ship or import under 15 mmbf that apply for and receive an exemption certificate from the Softwood Lumber Board do not have to pay assessments.

When will USDA conduct a continuance referendum on the checkoff?

USDA will conduct a referendum no later than 2018. This will meet the deadline in the 1996 Act which requires that USDA conduct this referendum no later than 7 years after assessments first begin under a program. (The program initially required a referendum to be held in 2016, but this timeframe was revised due to Resolute's lawsuit.)

Where can I find out more?

For more information, contact the Promotion and Economics Division, Specialty Crops Program, AMS, USDA; 1400 Independence Avenue, SW.; Room 1406-S, STOP 0244, Washington, DC 20250-0244; (202) 720-9915.