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B-336159

April 15, 2024

The Honorable Debbie Stabenow
Chairwoman
The Honorable John Boozman
Ranking Member
Committee on Agriculture, Nutrition, and Forestry
United States Senate

The Honorable Glenn Thompson
Chairman
The Honorable David Scott
Ranking Member
Committee on Agriculture
House of Representatives

Subject: *U.S. Department of Agriculture, Farm Service Agency, Commodity Credit Corporation: Supplemental Dairy Margin Coverage Payment; Conservation Reserve Program; Dairy Indemnity Payment Program; Marketing Assistance Loans, Loan Deficiency Payments, and Sugar Loans; and Oriental Fruit Fly Program*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the U.S. Department of Agriculture, Farm Service Agency, and Commodity Credit Corporation (collectively, the Agencies) titled “Supplemental Dairy Margin Coverage Payment; Conservation Reserve Program; Dairy Indemnity Payment Program; Marketing Assistance Loans, Loan Deficiency Payments, and Sugar Loans; and Oriental Fruit Fly Program” (RIN: 0560-AI59). We received the rule on March 19, 2024. It was published in the *Federal Register* as a final rule on December 13, 2021. 86 Fed. Reg. 70689. The effective date is December 13, 2021.

According to the Agencies, this final rule amends the regulations for Dairy Margin Coverage (DMC) to allow supplemental DMC payments to participating eligible dairy operations. The Agencies stated that DMC provides dairy producers with risk management coverage that pays producers when the difference between the price of milk and the cost of feed (the margin) falls below a certain level. The Agencies also stated that eligible dairy operations with less than 5 million pounds of established production history may enroll supplemental pounds based upon a formula using 2019 actual milk marketings. The Agencies stated further that supplemental DMC coverage is applicable to calendar years 2021, 2022, and 2023, and that participating dairy operations with supplemental production may receive supplemental payments in addition to payments based on their established production history.

In addition, the Agencies, noted that the rule amends the alfalfa hay calculation used in determining the average feed cost and actual dairy production margin. The Agencies also

explained, to end prolonged months of milk indemnity payments, the final rule amends the regulations for the Dairy Indemnity Payment Program to indemnify affected farmers for depopulating and permanently removing cows after discovery of chemical residues affecting the commercial marketing of milk for the applicable farm and likely affecting the marketability of cows for a lengthy duration.

Finally, the Agencies stated that the final rule also implements a new Oriental Fruit Fly Program as authorized in the Consolidated Appropriations Act, 2019. See *generally* Pub. L. No. 116-6, 133 Stat. 13 (Feb. 15, 2019). The Agencies also stated that the final rule updates the existing Marketing Assistance Loans and Loan Deficiency Payments loan rates to be consistent with the Agriculture Improvement Act of 2018 (2018 Farm Bill); the loan rates were already changed administratively because the loan rate changes were self-enacting. See *generally* 2018 Farm Bill, Pub. L. No. 115-334, 132 Stat. 4490 (Dec. 20, 2018). The Agencies stated further that the final rule also amends the Conservation Reserve Program regulations to remove two discretionary requirements.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. § 808(2). The Agencies stated that they are authorized to provide payments to the producers to comply with the Consolidated Appropriations Act, 2021, in providing the Supplemental DMC payments to dairy producers in the DMC Program. See *generally* Pub. L. No. 116-260, 134 Stat. 1182 (Dec. 27, 2020). The Agencies also stated that notice and public procedure are contrary to the public interest. Therefore, the Agencies asserted that even though this rule is a major rule for purposes of CRA, the Agencies are not required to delay the effective date for 60 days from the date of publication to allow for congressional review.¹

Enclosed is our assessment of the Agencies' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to

¹ Although the Agencies waived CRA's 60-day delay in effective date requirement, we note that the Agencies did not deliver the rule to Congress until April 5, 2024. We initially requested confirmation of receipt from the Agencies on March 22, 2024, but they sent us a receipt for a different rule not subject to this report. We informed the Agencies about the error. In response, they explained that they had to schedule this final rule for delivery to Congress. On April 9, 2024, we received sufficient proof of delivery showing that this final rule was delivered to both Houses of Congress on April 5, 2024. See Email from Branch Chief Regulatory Analysis & PRA Requirements Branch, USDA, to Senior Staff Attorney, GAO, *Subject: RE: CRA -- Supplemental Dairy Margin Coverage Payment; Conservation Reserve Program; Dairy Indemnity Payment Program; Marketing Assistance Loans, Loan Deficiency Payments; Sugar Loans; and Oriental Fruit Fly Program (RIN 0560-AI59) - December 13, 2021 (Apr. 9, 2024)*.

the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Mary A. Ball
FPAC-BC
U.S. Department of Agriculture

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
U.S. DEPARTMENT OF AGRICULTURE,
FARM SERVICE AGENCY,
COMMODITY CREDIT CORPORATION,
TITLED
“SUPPLEMENTAL DAIRY MARGIN COVERAGE PAYMENT;
CONSERVATION RESERVE PROGRAM; DAIRY INDEMNITY PAYMENT PROGRAM;
MARKETING ASSISTANCE LOANS, LOAN DEFICIENCY PAYMENTS,
AND SUGAR LOANS; AND ORIENTAL FRUIT FLY PROGRAM”
(RIN: 0560-AI59)

(i) Cost-benefit analysis

The U.S. Department of Agriculture, Farm Service Agency, and Commodity Credit Corporation (collectively, the Agencies) prepared an analysis of the costs and benefits of this final rule. According to the Agencies, the final rule makes certain program changes and implements a new program that will benefit eligible program participants. The Agencies estimate the final rule will result in total outlays of \$222.97, \$405.25, and \$359.23 million from fiscal years (FYs) 2021 through 2023, respectively. The agencies stated that the estimate for FY 2023 includes outlays from October through December of 2023. The Agencies also stated that the FY 2021 estimate does not include costs associated with the first quarter of FY 2021.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

According to the Agencies, this rule is exempt from the requirements in 5 U.S.C. § 553, and, therefore, it is also exempt from the regulatory analysis requirements of RFA. The Agencies stated that the requirements for RFA in 5 U.S.C. §§ 603–604 are specifically tied to the agency being required to issue a proposed rule by section 553 or any other law; further, the definition of rule in 5 U.S.C. § 601 is tied to the publication of a proposed rule.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

The Agencies determined that this rule contains no federal mandates, as defined under the Act, for state, local and tribal governments, or the private sector. Therefore, the Agencies stated, this final rule is not subject to the requirements the Act.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not

apply to this rule because it meets one of the Act's exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act's requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act" in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

In its submission to us, the Agencies indicated that the Act is not applicable to this final rule.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

The Agencies stated that section 9091 of title 7, United States Code, exempts the regulations to implement the Dairy Margin Coverage Program, Dairy Indemnity Payment Program, and Marketing Assistance Loans and Loan Deficiency Payments Programs from notice and comment procedures under the Act. The Agencies also stated that section 3846 of title 16, United States Code, provides that the regulations to implement the Conservation Reserve Program are to be made as an interim rule effective on publication, with an opportunity for notice and comment. The Agencies stated that they published an interim final rule in the *Federal Register* on December 6, 2019. 84 Fed. Reg. 66813. The Agencies noted that the final rule contains changes in response to comments made in response to the interim final rule. The Agencies stated that they received 67 public comments in response to the interim final rule. The Agencies also stated that they are not responding to all comments, but only those regarding the two provisions being amended in this rule. The Agencies stated further that the comments not addressed in this rule will be addressed at a later date.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

According to the Agencies, the regulations to implement the Dairy Margin Coverage Program, Dairy Indemnity Payment Program, and the Marketing Assistance Loans and Loan Deficiency Payments Programs are exempt from PRA as specified under 7 U.S.C. § 9091 and the regulations to implement the Conservation Reserve Program are exempt from PRA as specified in 16 U.S.C. § 3846. Additionally, the Agencies stated that it submitted a new information collection to OMB for emergency approval. The new information collection request supports the Oriental Fruit Fly (OFF) Program (OMB Control Number 0560-New). The Agencies estimate the annual burden on respondents to be 522 hours.

Statutory authorization for the rule

The Agencies promulgated this final rule pursuant to sections 450j-1, 1359aa–1359jj, 1421, 1441, 1531, 4501, 7231–7237, 7272, 7931–7936, 8110, 9011, 9031–9060, and 9071 of title 7; 714b, 714c, and 714j of title 15, 3801 note, 3801–3847 of title 16; section 2497 of title 19, United States Code; title III of Public Law 109-234; title IX of Public Law 110-28; section 748 of Public Law 111-80; title I of Public Law 115-123; title I of Public Law 116-20; division B, title VII of Public Law 116-94, and section 778 of Public Law 116-6.

Executive Order No. 12866 (Regulatory Planning and Review)

The Agencies stated that OMB designated this rule as economically significant under the Order and that OMB has reviewed this rule.

Executive Order No. 13132 (Federalism)

In its submission to us, the Agencies indicated that it did not address the Order in this final rule.