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United States Government Accountability Office  
Washington, DC 20548

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B-318410

July 21, 2009

The Honorable Tom Harkin  
Chairman  
The Honorable Saxby Chambliss  
Ranking Minority Member  
Committee on Agriculture, Nutrition, and Forestry  
United States Senate

The Honorable Collin C. Peterson  
Chairman  
The Honorable Frank D. Lucas  
Ranking Minority Member  
Committee on Agriculture  
House of Representatives

Subject: *Department of Agriculture, Commodity Credit Corporation: Direct and Counter-Cyclical Program and Average Crop Revenue Election 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 Department of Agriculture, Commodity Credit Corporation (CCC), entitled “Direct and Counter-Cyclical Program and Average Crop Revenue Election Program” (RIN: 0560-AH84). It was published in the *Federal Register* as a final rule on December 29, 2008. 73 Fed. Reg. 79,284. It was received by the Senate on January 8, 2009, and by the House of Representatives on January 21, 2009. 155 Cong. Rec. S307 (January 12, 2009); 155 Cong. Rec. H524 (January 26, 2009). As of July 20, 2009, we have not received the rule.

The final rule implements the provisions of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) regarding the direct and counter-cyclical payment program for the 2008 through 2012 crop years as well as the Average Crop Revenue Election (ACRE) program payments for the 2009 through 2012 crop years. The payments provide income support to producers of eligible commodities and are based on historically-based acreage and yields and do not depend on the current production choices of the farmer. The 2008 Farm Bill provides payments to eligible producers of covered commodities and peanuts and, beginning in 2009, pulse crops as well. The 2008 Farm Bill also provides for the establishment of a yield for each farm for any designated oilseed or eligible pulse crop for which a payment yield was not established under the 2002 Farm Bill.

The Congressional Review Act requires major rules to have a 60-day delay in their effective date following their publication in the *Federal Register* or receipt by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). However, notwithstanding the 60-day delay requirement, any rule that an agency for good cause finds that notice and public procedures are impractical, unnecessary, or contrary to the public interest is to take effect when the promulgating agency so determines. 5 U.S.C. § 808(2). Section 1601(c)(3) of the 2008 Farm Bill directs CCC to make this finding. 7 U.S.C. § 8781(c)(3). Accordingly, CCC determined that this final rule affects a large number of agricultural producers who are dependent on these provisions for income support and need to know the details as soon as possible, and that this constitutes good cause to make the rule effective December 23, 2008. Therefore, the requirement to have a 60-day delay does not apply to this rule.

Before a rule can take effect, the Congressional Review Act requires the promulgating agency to submit to the Comptroller General, in addition to each House of Congress, a copy of the rule, a concise general statement relating to the rule including whether it is a major rule, and the proposed effective date of the rule. 5 U.S.C. § 801(a)(1)(A). As of July 20, 2009, we have not received a copy of this rule. Although CCC's finding of good cause means that the effective date is not affected by the non-submission of the rule to GAO, the requirement to submit the rule to the Comptroller General is still applicable.

Enclosed is our assessment of the CCC's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that, except for the failure to file the rule with our Office, CCC complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer  
Managing Associate General Counsel

Enclosure

cc: Glen L. Keppy  
Acting Executive Vice President  
Commodity Credit Corporation  
Department of Agriculture

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF AGRICULTURE,  
COMMODITY CREDIT CORPORATION  
ENTITLED  
"DIRECT AND COUNTER-CYCLICAL PROGRAM AND  
AVERAGE CROP REVENUE ELECTION PROGRAM"  
(RIN: 0560-AH84)

(i) Cost-benefit analysis

CCC performed a cost-benefit analysis in conjunction with the final rule. Overall, CCC estimates that the final rule will result in an increase of \$487 million in average annual government outlays for the payments in Fiscal Years 2008-2012.

Direct payments are projected to average \$4.749 billion in FY 2008 through 2014 for crop years 2008 through 2012. These payments represent a decrease of about \$0.484 billion each crop year compared with direct payments under the 2002 Farm Bill. Counter-cyclical payments are projected to average \$0.089 billion in FY 2008 through 2014 for crop years 2008 through 2012, which represents a decrease of \$0.043 billion compared with counter-cyclical payments under the 2002 Farm Bill. Annual Crop Revenue Election (ACRE) program payments are projected to average \$1.014 billion each crop year.

The final rule continues the policy of planting flexibility by decoupling the payments from the production decisions of individual farmers, and continues marketing assistance loan provisions at higher levels for some crops in some years.

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

CCC determined that the Regulatory Flexibility Act does not apply to this final rule, because CCC was not required to publish a notice of proposed rulemaking for this final rule.

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

The Unfunded Mandates Reform Act does not apply to this final rule, because CCC is not required to publish a notice of proposed rulemaking for this final rule. However, CCC additionally states in the final rule that the rule contains no federal mandates for state, local, and tribal governments or the private sector.

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

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

Under section 1601(c) of the 2008 Farm Bill, which authorizes this final rule, the rule is exempt from the notice and comment requirements of the Administrative Procedure Act.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule is exempt from the Paperwork Reduction Act under section 1601(c)(2) of the 2008 Farm Bill.

Statutory authorization for the rule

The final rule is authorized by the provisions of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill). Pub. L. 110-234, 122 Stat. 923.

Executive Order No. 12866 (Regulatory Planning and Review)

The Office of Management and Budget (OMB) designated the final rule as economically significant under the Order, and the final rule has been reviewed by OMB under the Order. CCC prepared a cost benefit analysis in conjunction with the final rule.

Executive Order No. 13132 (Federalism)

CCC determined that the final rule will not have any substantial direct effect on states, on the relationship between the national government and the states, or on the distribution of power among the various levels of government. CCC further determined that this final rule will not impose any substantial direct compliance costs on state and local governments.