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February 28, 2011

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

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

Subject: *Department of Agriculture, Rural Business-Cooperative Service and Rural Utilities Service: Advanced Biofuel Payment 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 (USDA), Rural Business-Cooperative Service and Rural Utilities Service, entitled “Advanced Biofuel Payment Program” (RIN: 0570-AA75). We received the rule on January 19, 2011. It was published in the *Federal Register* as an interim rule with request for comments on February 11, 2011. 76 Fed. Reg. 7936. Written comments must be received on or before April 12, 2011.

The interim rule with request for comments establishes new program requirements for applicants to submit applications for fiscal year 2010 payments for the Advanced Biofuel Payment Program. These new program requirements supersede the Notice of Contract Proposal (NOCP) for Payments to Eligible Advanced Biofuel Producers in its entirety.

Additionally, USDA is establishing the Advanced Biofuel Payment Program authorized under the Food, Conservation, and Energy Act of 2008. Under this Program, USDA will enter into contracts with advanced biofuel producers to pay such producers for the production of eligible advanced biofuels. To be eligible for payments, advanced biofuels must be produced from renewable biomass, excluding corn kernel starch, in a biofuel facility located in a state.

The interim rule with request for comments has an effective date of March 14, 2011. 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). 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. §§ 553(d)(3), 808(2). Accordingly, USDA believes the time frames mandated by a Presidential Memorandum necessitate implementing the program as quickly as possible and providing for public comment under normal procedure would unduly delay the provision of benefits associated with this program and be contrary to the public interest.

Enclosed is our assessment of USDA'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 USDA 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: Judith A. Canales
Administrator
Rural Business-Cooperative Service
Department of Agriculture

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF AGRICULTURE,
RURAL BUSINESS-COOPERATIVE SERVICE AND
RURAL UTILITIES SERVICE
ENTITLED
"ADVANCED BIOFUEL PAYMENT PROGRAM"
(RIN: 0570-AA75)

(i) Cost-benefit analysis

USDA conducted benefit-cost analyses and quantified the cost of the Advanced Biofuel Payment Program, but did not quantify its benefits. According to USDA, costs were quantified for the burden of the program to the public and to the federal government, but its economic impacts were not quantified. USDA explains that qualitative discussions of potential impacts of the program on jobs, the environment, and energy are presented in the analysis. While unable to quantify the benefits associated with this rulemaking, USDA believes that the overall effect of the rule will be beneficial.

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

USDA has determined that this action will not have an economically significant impact on a substantial number of small entities. USDA made this determination based on the fact that this regulation only impacts those who choose to participate in the Program. USDA believes small entity applicants will not be affected to a greater extent than large entity applicants.

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

USDA states that this interim rule with request for comments contains no federal mandates (under the regulatory provisions of Title II of the UMRA) for state, local, and tribal governments or the private sector and, thus, is not subject to the requirements of sections 202 and 205 of the UMRA.

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

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

The interim rule with request for comments was issued using the notice and comment procedures found at 5 U.S.C. § 553. On April 16, 2010, USDA published a

proposed rule for the Advanced Biofuel Payment Program. 75 Fed. Reg. 20,085. Comments were requested on the proposed rule, which are summarized in the interim rule with request for comments.

Additionally, USDA states that it found “good cause” under 5 U.S.C. § 553 to waive the notice of proposed rulemaking based on time frames mandated by a Presidential Memorandum which necessitate implementing the program as quickly as possible. USDA believes that providing for public comment under normal procedure would unduly delay the provision of benefits associated with this program and be contrary to the public interest.

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

USDA explains that the information collection requirements contained in the Notice of Contract Proposal for the Section 9005 Advanced Biofuels Payments Program published on June 12, 2009, were approved by the Office of Management Budget (OMB) under emergency clearance procedures and assigned OMB Control Number 0570–0057. As noted in the June 12, 2009 notice, USDA sought emergency clearance to comply with the time frames mandated by a Presidential Memorandum in order to implement the program as quickly as possible, and that providing for public comment under the normal procedure would unduly delay the provision of benefits associated with this program and be contrary to the public interest. Now, however, in accordance with the Paperwork Reduction Act of 1995, USDA is seeking standard OMB approval of the reporting and recordkeeping requirements contained in this interim rule.

Statutory authorization for the rule

USDA states that the interim rule with request for comments is authorized by 5 U.S.C. § 301 and 7 U.S.C. § 1989.

Executive Order No. 12,866 (Regulatory Planning and Review)

USDA states that this interim rule with request for comments has been reviewed under the Order and has been determined to be economically significant by OMB.

Executive Order No. 13,132 (Federalism)

USDA has determined that this interim rule with request for comments does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. USDA states that the provisions contained in this rule will not have a substantial direct effect on states or their political subdivisions or on the distribution of power and responsibilities among the various government levels.