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Office of the General Counsel

B-275144

October 28, 1996

The Honorable Richard G. Lugar  
Chairman  
The Honorable Patrick J. Leahy  
Ranking Minority Member  
Committee on Agriculture, Nutrition, and Forestry  
United States Senate

The Honorable Pat Roberts  
Chairman  
The Honorable E (Kika) de la Garza  
Ranking Minority Member  
Committee on Agriculture  
House of Representatives

Subject: Department of Agriculture: Dairy Tariff-Rate Import Quota Licensing

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by Department of Agriculture, entitled "Dairy Tariff-Rate Import Quota Licensing." We received the rule on October 15, 1996. It was published in the Federal Register as a final rule on October 9, 1996. 61 Fed Reg. 53001. The rule was effective on the publication date pursuant to 5 U.S.C. § 808(2) upon a finding by the Secretary that a "delay in the implementation of the rule pending congressional review would be contrary to the public interest."<sup>1</sup>

Enclosed is our assessment of the Department of Agriculture's compliance with the procedural steps required by sections 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule.

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<sup>1</sup>The Secretary's statement of the reason for the determination is included in the rule as required by the statute. It states that "if the effective date for this rule were delayed . . . the reform of the dairy licensing system would be delayed by an entire year since the rule must be in place prior to the close of the application period for next year's licenses."

The rule substantially revises the existing regulations governing the administration of the import licensing system to incorporate the Uruguay Round Agreement (the Agreement) which provides for increased access to the United States market for dairy articles (primarily cheese). Interim rules were published in 1995 which made certain modifications to the existing rule and implemented the Agreement commitments for the 1995-96 quota years.<sup>2</sup> The rule also updates and modifies the regulatory process.

The regulation reflects the market access provisions of the Agreement wherein the United States agreed to end quantitative restrictions that had been imposed on certain dairy products.<sup>3</sup> Instead, tariff rate quotas were established for certain dairy products by which a limited level of imports are permitted at a low tariff rate and any imports beyond that level are assessed a tariff at a higher rate. The Agreement also gave the countries that received increased access to the United States cheese market the right to designate importers that could import the additional cheese, some of which are subsidiaries of exporters that are state trading enterprises.<sup>4</sup> This is not expected to affect prices and market share for the U.S. dairy industry as a whole, because access to the U.S. market is limited by the tariff rate quota system.<sup>5</sup>

The General Accounting Office has issued three reports on the issues related to these regulations, GAO/RCED-95-280R, Cheese Imports, September 29, 1995; STATE TRADING ENTERPRISES: Compliance with the General Agreement on Tariffs and Trade (GAO/GGD-95-208), August 30, 1995; CANADA, AUSTRALIA, NEW ZEALAND: Potential Ability of Agricultural State Trading Enterprises to Distort Trade (GAO/NSIAD-96-94), June 24, 1996.

If you have any questions about this report, please contact Alan Zuckerman, Assistant General Counsel, at (202) 512-4586. The official responsible for GAO

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<sup>2</sup>60 Fed. Reg. 1989, January 6, 1995; 60 Fed. Reg. 21425, May 2, 1995; 60 Fed. Reg. 47453, September 13, 1995.

<sup>3</sup>Section 22 of the Agricultural Adjustment Act of 1933 as amended, 7 U.S.C. § 624.

<sup>4</sup>GAO/RCED-95-280R, supra.

<sup>5</sup> id.

evaluation work relating to the rule is Julie Gerkens, Assistant Director, Food and Agriculture Issues, Resources, Community and Economic Development Division. Ms. Gerkens can be reached at (202) 512-9824.

Robert P. Murphy  
General Counsel

Enclosure

cc: The Honorable Dan Glickman  
The Secretary of Agriculture

ANALYSIS UNDER 5 U.S.C. §§ 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE  
ISSUED BY  
THE DEPARTMENT OF AGRICULTURE  
ENTITLED  
"DAIRY TARIFF-RATE IMPORT QUOTA LICENSING"

(i) Cost-benefit analysis

The Department has prepared Regulatory Impact Analysis in which the costs of the rule and the benefits are analyzed. That analysis indicates that the costs of administering the import licensing program consists mainly of salaries and equipment both for processing applications, issuing the licenses and monitoring the imports. These costs, which are estimated to be about \$383,000 for 1997, are recovered by the license fees charged importers (these fees are estimated to be \$103.00-\$136.00 per license through 1998). The costs to consumers of these fees should be less than .01 per pound of cheese and other licensed dairy products.

The analysis also indicates that there should be no significant change in type and timing of imported dairy products and that the rule is expected to have no effect on the dairy price support program. The analysis claims that the rule will better ensure that the entities actually using and selling imported dairy products are the recipients of import licenses as opposed to those who broker their licenses; and that new entrants and existing business should be provided with better access to licenses.

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

The preamble to the regulation claims that the Regulatory Flexibility Act is not applicable to the rule because "the Office of the Secretary is not required by 5 U.S.C. § 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject of this rule." The agency relies on the "foreign affairs function" exemption of 5 U.S.C. § 553(a)(1) for this assertion because of the international trade agreement.

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

This rule is not subject to the Unfunded Mandates Reform Act of 1995 (UMRA). The Act defines a rule as having the meaning prescribed by the Regulatory Flexibility Act, and as the agency claims this rule is not rule covered by that Act, it is likewise not a rule under UMRA.

(iv) Other relevant information or requirements under Acts and Executive orders

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

Notwithstanding its assertion that the Office of the Secretary is not required to publish a notice of proposed rulemaking, the rule was promulgated through an advance notice of proposed rulemaking on June 2, 1994 (59 Fed. Reg. 28495), with a public comment period ending on August 2, 1994. Interim rules were subsequently published with public comments solicited. A public hearing was held on March 10, 1995. Comments received in response to the advance notice and written testimony and briefs submitted in response to the hearing were addressed in the proposed rule published at 61 Fed. Reg. 1233, January 18, 1996. This final rule discusses the "major" comments received by the department.

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

The final rule contains information collection requirements that are subject to review by the Office of Management and Budget (OMB) and was approved by OMB, OMB Control No. 0551-0001.

Statutory authorization for the rule

19 U.S.C. § 1202, as amended, 19 U.S.C. §§ 3513 and 3601.

Executive Order No. 12866

The final rule was determined to be economically significant and is therefore subject to Executive Order 12866. The rule has been reviewed by OMB.