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United States Government Accountability Office
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May 3, 2010

The Honorable Carl Levin
Chairman
The Honorable John McCain
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Ike Skelton
Chairman
The Honorable Howard P. "Buck" McKeon
Ranking Member
Committee on Armed Services
House of Representatives

Subject: *Department of Defense, Office of the Secretary: Retroactive Stop Loss
Special Pay Compensation*

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 Defense (DoD), Office of the Secretary, entitled "Retroactive Stop Loss Special Pay Compensation" (RIN: 0790-AI59). We received the rule on April 22, 2010. It was published in the *Federal Register* as a final rule on April 16, 2010. 75 Fed. Reg. 19,878.

The final rule provides for retroactive stop loss special pay as authorized and appropriated in the Supplemental Appropriations Act, 2009. This program is of short duration, from October 21, 2009, to October 21, 2010. The last day for submission of claims to the Secretaries of the Military Departments for retroactive stop loss special pay is October 21, 2010.

An interim final rule was published on October 23, 2009, with an effective date of October 21, 2009, to comply with section 310 of Public Law 111-32 that called for the Secretary of Defense to issue a rule not later than 120 days from the date of enactment of the Act. However, the Department of Defense Appropriations Act, 2010, section 8108, contains statutory provisions that modify eligibility for retroactive stop loss special pay and extend payments for stop loss special pay to active duty service members serving under the stop loss authority through FY 2010. Under these provisions, service members who voluntarily reenlisted or extended

their service or suspended their retirement and received a bonus for such reenlistment or extension of service are not eligible to receive the retroactive stop loss special pay. The change of eligibility for retroactive stop loss special pay was effective on December 19, 2009. DoD has determined that good cause exists here for exemption from public comment of these changes and their effective date as they are in direct compliance with the statute.

The amount of special pay remains \$500 per month. If an eligible member dies before the payment is made, the Secretary of the Military Department concerned shall make the payment in accordance with section 2771 of title 10, United States Code. A new paragraph (b) has been added to § 279.2 of the final rule to reflect the change in eligibility. A new paragraph (c) has been added to § 279.3 of the final rule to reflect the payment rules when an eligible member dies before payment can be made.

Enclosed is our assessment of the DoD'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 DoD 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: Patricia L. Toppings
OSD *Federal Register* Liaison Officer
Department of Defense

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF DEFENSE,
OFFICE OF THE SECRETARY
ENTITLED
"RETROACTIVE STOP LOSS SPECIAL PAY COMPENSATION"
(RIN: 0790-AI59)

(i) Cost-benefit analysis

DoD did not include a cost-benefit analysis with the final rule.

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

DoD certifies that the final rule is not subject to the Regulatory Flexibility Act (5 U.S.C. § 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities.

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

DoD certifies that the final rule does not contain a federal mandate resulting in expenditure by state, local, and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any one year.

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

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

DoD published an interim final rule on October 23, 2009, with an effective date of October 21, 2009, to comply with section 310 of Public Law 111-3 (74 Fed. Reg. 54,751 through 54,754). No comments were received on the interim final rule. 75 Fed. Reg. 19,878. DoD states that good cause exists, pursuant to 5 U.S.C. § 553, to forego the normal notice and comment and effective date procedures regarding the final rule as they are in direct compliance with the statute.

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

DoD certifies that the final rule does impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995. These requirements have been approved by the Office of Management and Budget (OMB) under OMB Control Number 0704-0464.

Statutory authorization for the rule

DoD states the final rule is authorized and appropriated in the Supplemental Appropriations Act, 2009. Pub. L. No. 111–32 § 310, as amended.

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

DoD certifies that the final rule does have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or state, local, or tribal governments or communities. The Supplemental Appropriations Act, 2009 appropriated \$534,400,000 to the Department of Defense, to remain available for obligation until expended: provided that such funds shall be available to the Secretaries of the Military Departments only to make payment of claims specified by this law.

Executive Order No. 13,132 (Federalism)

DoD certifies that the final rule does not have federalism implications, as set forth in Executive Order 13,132. DoD states the final rule does not have substantial direct effects on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government.