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United States Government Accountability Office
Washington, DC 20548

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February 12, 2010

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

The Honorable Ike Skelton
Chairman
The Honorable Howard P. "Buck" McKeon
Ranking Minority 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 January 27, 2010. It was published in the *Federal Register* as an interim final rule on October 23, 2009. 74 Fed. Reg. 54,751.

The interim final rule provides for retroactive stop loss special pay as authorized and appropriated in the Supplemental Appropriations Act, 2009. DoD states the prompt implementation of the interim final rule is of critical importance as Congress dictated the program be implemented within 120 days following the signing of the Supplemental Appropriations Act, 2009, which was signed June 24, 2009. Additionally, 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.

The interim final rule is effective on October 21, 2009. 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. Sections 553(d)(3), 808(2). DoD believes the statutory deadline provides good cause for making the rule effective upon publication.

Enclosed is our assessment of 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

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 interim final rule.

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

DoD certifies that the interim final rule is not subject to the Act 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 interim final rule does not contain a federal mandate resulting in expenditure by the private sector, or state, local, and tribal governments, in aggregate, 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 issued this rule as an interim final rule on October 23, 2009. DoD stated that the prompt implementation of the interim final rule is of critical importance as Congress dictated the program be implemented within 120 days following the signing of the Supplemental Appropriations Act, 2009, which was signed June 24, 2009. DoD states the statutory deadline provides good cause, pursuant to 5 U.S.C. 553(d)(3), to make this rule effective immediately upon publication. The rule noted, however, that comments could be submitted through December 22, 2009.

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

Section(s) 279.4(b) of the interim final rule contains information collection requirements. DoD has submitted a copy of this section to the Office of Management and Budget (OMB) for review.

Statutory authorization for the rule

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

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

DoD certifies that the interim final rule does not 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.

Executive Order No. 13,132 (Federalism)

DoD certifies that the interim final rule will 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, and, therefore, does not have federalism implications.