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United States Government Accountability Office
Washington, DC 20548

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October 14, 2008

The Honorable Joseph I. Lieberman
Chairman

The Honorable Susan M. Collins
Ranking Minority Member
Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Carl Levin
Chairman

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

The Honorable Henry A. Waxman
Chairman

The Honorable Thomas A. Davis III
Ranking Minority Member
Committee on Oversight and Government Reform
House of Representatives

The Honorable Ike Skelton
Chairman

The Honorable Duncan Hunter
Ranking Minority Member
Committee on Armed Services
House of Representatives

Subject: *Department of Defense and Office of Personnel Management: National Security Personnel System*

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) and Office of Personnel Management (OPM), entitled "National Security Personnel System" (RIN: 3206-AL62). We received the rule jointly from OPM and DOD on September 29, 2008. It was published in the *Federal Register* as a final rule on September 26, 2008. 73 Fed. Reg. 56,344.

The final rule updates the regulations that govern the operation of the National Security Personnel System (NSPS) regarding compensation, classification, and performance management. These changes were made in response to operational experience under NSPS and changes the National Defense Authorization Act of 2008 made to the law authorizing NSPS. The National Defense Authorization Act of 2008 required that rules implementing NSPS be treated as major rules under the Congressional Review Act.¹

The final rule eliminates several subparts dealing with areas where NSPS now falls under government-wide rules, such as staffing, workforce shaping, adverse actions, appeals, and labor relations. Previous regulations outlined a framework for NSPS and provided detail through implementing issuances; now, due to changes in the law, the final rule establishes the structure of NSPS in much more detail for purposes of uniformity and consistency of the operation of NSPS.

The final rule provides specific details for entitlement to retroactive effective date of a classification decision, and provides discretionary authority to give targeted general salary increases to designated occupational series. The final rule allows employees who are covered by General Schedule (GS) grade and pay retention rules at the time of conversion to maintain that pay retention indefinitely, subject to specifically identified events. The final rule adds a process for converting employees out of NSPS when their position is removed from coverage and to provide a “virtual GS grade” to employees who leave their position to accept employment in a General Schedule position. Finally, the final rule specifically outlines safeguards to ensure the NSPS performance and pay pool management system is fair and equitable based on employee performance.

Enclosed is our assessment of DOD’s and OPM’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 indicates that they 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 Michael R. Volpe, Assistant General Counsel, at (202) 512-8236.

signed

Robert J. Cramer
Associate General Counsel

Enclosure

¹ Section 1106(b) of Pub. L. No. 110-181, Jan. 28, 2008.

cc: Michael W. Hager
Acting Director
Office of Personnel Management

Gordon England
Deputy Secretary
Department of Defense

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF DEFENSE AND
OFFICE OF PERSONNEL MANAGEMENT
ENTITLED
"NATIONAL SECURITY PERSONNEL SYSTEM"
(RIN: 3206-AL62)

(i) Cost-benefit analysis

DOD estimates that the overall costs associated with continuing to implement NSPS to all eligible employees will be approximately \$143 million from fiscal years 2009 through 2011. DOD states that the primary benefit to the public will be to enable DOD to attract, build, and retain a high-performing workforce focused on effective and efficient mission accomplishment.

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

DOD and OPM determined that these regulations would not have a significant economic impact on a substantial number of small entities because they would apply only to federal agencies and employees.

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

DOD and OPM determined that these regulations would not result in the expenditure by state, local or tribal governments of more than \$100 million annually.

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

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

The proposed rule was published in the *Federal Register* on May 22, 2008. 73 Fed. Reg. 29,882. During the 30-day period for public comment, 526 comment submissions were received. DOD and OPM responded to the comments in the final rule published on September 26, 2008. 73 Fed. Reg. 56,344.

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

The final rule will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

Statutory authorization for the rule

The final rule is authorized by the authority in the National Defense Authorization Act of 2008, Pub. L. 110-181, codified at 5 U.S.C. § 9902.

Executive Order No. 12,866

DOD and OPM determined that the final rule is a significant regulatory action under the Order because there is significant public interest in the National Security Personnel System; therefore, the final rule was reviewed by the Office of Management and Budget.

Executive Order No. 13,132 (Federalism)

DOD and OPM have determined these final regulations would not have federalism implications because they would apply only to federal agencies and employees.