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August 21, 2012

The Honorable Patrick J. Leahy
Chairman
The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate

The Honorable Larmar Smith
Chairman
The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
House of Representatives

Subject: *Department of Justice: National Standards To Prevent, Detect, and Respond to Prison Rape*

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 Justice (Justice), entitled “National Standards To Prevent, Detect, and Respond to Prison Rape” (RIN: 1105-AB34). We received the rule on August 7, 2012. It was published in the *Federal Register* as a “final rule; request for comment on specific issue” on June 20, 2012. 77 Fed. Reg. 37,106.

The final rule adopts national standards to prevent, detect, and respond to prison rape, as required by the Prison Rape Elimination Act of 2003 (PREA).

The rule has a stated effective date of August 20, 2012. 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). The rule was published in the *Federal Register* on June 20, 2012, and we did not receive the rule until August 7, 2012. Therefore, putting aside the compliance date, the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of Justice'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, with the exception in the delay of effective date, Justice 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: Eric Columbus
Senior Counsel to the
Deputy Attorney General
Department of Justice

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF JUSTICE
ENTITLED
"NATIONAL STANDARDS TO PREVENT, DETECT
AND RESPOND TO PRISON RAPE"
(RIN: 1105-AB34)

(i) Cost-benefit analysis

Justice performed a cost-benefit analysis in conjunction with the final rule. Justice used a break-even analysis to demonstrate that the anticipated costs of full nationwide compliance with the Prison Rape Elimination Act of 2003 (PREA) standards are amply justified by the anticipated benefits. Using this break-even analysis, Justice determined that for the costs of full nationwide compliance to break even with the monetized benefits of avoiding prison rape, the standards would have to be successful in reducing the annual number of prison sexual abuse victims by about 1,671, for a total reduction from the baseline over 15 years of about 25,000 victims. As a baseline, Justice estimated that in 2008 more than 209,400 persons were victims of sexual abuse in America's prisons, jails, and juvenile centers, of which at least 78,500 prison and jail inmates and 4,300 youth in juvenile facilities were victims of the most serious forms of sexual abuse, including forcible rape and other nonconsensual sexual acts involving injury, force, or high incidence. Justice expects that the standards, if fully adopted and complied with, would achieve at least this level of reduction in the prevalence of prison sexual abuse. Justice also notes the considerable non-monetized benefits of avoiding prison rape.

Justice concludes that full nationwide compliance with the standards would cost the correctional community, in the aggregate, approximately \$6.9 billion over the period 2012–2026, or \$468.5 million per year when annualized at a 7 percent discount rate. The average annualized cost per facility of compliance with the standards is approximately \$55,000 for prisons, \$50,000 for jails, \$24,000 for community confinement facilities, and \$54,000 for juvenile facilities. For lockups, the average annualized cost per agency is estimated at \$16,000.

Justice states further, however, that these figures are potentially misleading. The PREA does not require full nationwide compliance with the standards, nor does it enact a mechanism for Justice to direct or enforce such compliance; instead, the statute provides certain incentives for state (but not local or privately operated) confinement facilities to implement the standards. Fiscal realities faced by confinement facilities throughout the country make it virtually certain that the total actual outlays by those facilities will, in the aggregate, be less than the full

nationwide compliance costs calculated above. Justice states that actual outlays incurred will depend on the specific choices that state, local, and private correctional agencies make with regard to adoption of the standards, and correspondingly on the annual expenditures that those agencies are willing and able to make in choosing to implement the standards in their facilities. Justice has not projected those actual outlays.

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

Justice states that it drafted the final rule so as to minimize its impact on small entities, in accordance with the Regulatory Flexibility Act, while meeting PREA's intended objectives. Justice conducted an extensive consideration of the impact of this rule on small governmental entities, and available alternatives, and discussed those impacts and alternatives in the Regulatory Impact Analysis.

Justice provided notice of the proposed standards to potentially affected small governments; enabled officials of affected small governments to provide meaningful and timely input; and worked to inform, educate, and advise small governments on compliance with the requirements. Justice states that it has identified and considered a number of regulatory alternatives and from those alternatives has attempted to select the least costly, most cost-effective, and least burdensome alternative that achieves the objectives of PREA.

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

Justice concluded that the requirements of the UMRA do not apply to the final rule because UMRA excludes from its definition of "Federal intergovernmental mandate" those regulations imposing an enforceable duty on other levels of government which are "a condition of Federal assistance." 2 U.S.C. § 658(5)(A)(i)(I).

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

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

On March 10, 2010, Justice published an Advance Notice of Proposed Rulemaking (ANPRM) in the *Federal Register* soliciting public input on the proposed national standards. 75 Fed. Reg. 11,077. Justice received approximately 650 comments on the ANPRM, including comments from current or formerly incarcerated individuals, county sheriffs, state correctional agencies, private citizens, professional organizations, social service providers, and advocacy organizations concerned with issues involving inmate safety and rights, sexual violence, discrimination, and juvenile justice. After reviewing the comments on the ANPRM, and after receiving and reviewing the cost analysis of those standards, Justice published a Notice of

Proposed Rulemaking (NPRM) in the *Federal Register* on February 3, 2011. 76 Fed. Reg. 6,248. Justice received more than 1,300 comments on the NPRM, and responded to those comments in the final rule. 77 Fed. Reg. 37,106.

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

The final rule contains information collection requirements subject to the Paperwork Reduction Act. The information collections in the final rule require covered facilities to retain certain specified information relating to sexual abuse prevention planning, responsive planning, education and training, and investigations, as well as to collect and retain certain specified information relating to allegations of sexual abuse within the facility. Justice has submitted an information collection request with burden estimates to the Office of Management and Budget (OMB) for review and approval.

Statutory authorization for the rule

The final rule is authorized by the Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (Sep. 4, 2003), as codified at 42 U.S.C. §§ 15601-15609.

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

Justice has determined that this final rule is a “significant regulatory action” under Executive Order 12,866, § 3(f)(1), and accordingly has submitted it to the OMB for review.

Executive Order No. 13,132 (Federalism)

Justice determined that the final rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.