



G A O

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

B-319579

April 27, 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: TRICARE; Relationship Between the TRICARE Program and Employer-Sponsored Group Health Coverage*

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 "TRICARE; Relationship Between the TRICARE Program and Employer-Sponsored Group Health Coverage" (RIN: 0720-AB17). We received the rule on April 12, 2010. It was published in the *Federal Register* as a final rule on April 9, 2010, with an effective date of June 18, 2010. 75 Fed. Reg. 18,051.

The final rule implements section 1097c of Title 10, United States Code, as added by section 707 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364. This law prohibits employers from offering incentives to TRICARE-eligible employees to not enroll or to terminate enrollment in an employer-offered Group Health Plan (GHP) that is or would be primary to TRICARE, in the same manner as employers are prohibited from offering incentives to Medicare-eligible employees. The purpose of the prohibition on incentives not to enroll in employer sponsored GHPs is to prevent employers from shifting their responsibility for their employees onto DoD. Benefits offered through cafeteria plans that comport with section 125 of the Internal Revenue Code will be permissible as long as the plan treats all similarly situated employees eligible for benefits the same and does not illegally take TRICARE eligibility into account. TRICARE supplemental insurance

plans, because they are limited to TRICARE beneficiaries exclusively, are generally impermissible.

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 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
"TRICARE; RELATIONSHIP BETWEEN THE TRICARE PROGRAM
AND EMPLOYER-SPONSORED GROUP HEALTH COVERAGE"
(RIN: 0720-AB17)

(i) Cost-benefit analysis

DoD completed an estimated annual impact analysis. An updated analysis of DoD's cost and population data for FY09 indicates that the average MHS cost per active duty family members (NADFM) user under age 65 was \$3,975 (in FY09 dollars). After adjusting for inflation to FY10, DoD estimates that the current year (FY10) cost per NADFM user is \$4,293. Multiplying this cost per user by the 14,921 NADFM users who would shift to OHI rather than using TRICARE, due to section 707, yields an annual estimated cost impact of \$64.1 million in savings for Fiscal Year 2010. Based on a trend of 7-percent inflation offset by a projected 2-percent annual decrease in non-active duty family members under age 65, DoD estimates the following impact: \$64.1 million in savings for Fiscal Year 2010; \$67.3 million in savings for Fiscal Year 2011; \$70.6 million in savings for Fiscal Year 2012; \$74.2 million in savings for Fiscal Year 2013; \$77.9 million in savings for Fiscal Year 2014; and \$81.8 million in savings for Fiscal Year 2015.

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

DoD states that the rule will not have a significant impact on a substantial number of small entities for purposes of the act.

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

DoD believes that the rule does not contain unfunded mandates. DoD notes that it does not contain a federal mandate that may result in the 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.

The final regulations were issued using the notice and comment procedures found at 5 U.S.C. § 553. On March 24, 2008, the proposed rule was published in the *Federal Register*, for a 60-day comment period. DoD received 21 comments. 75 Fed. Reg. 18,052.

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

DoD states that the rule will impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501– 3511).

Statutory authorization for the rule

DoD states the final rule is authorized under 5 U.S.C. § 301; 10 U.S.C. chapter 55.

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

In the proposed rule, DoD stated that the rule was an economically significant rule, based on a Congressional Budget Office (CBO) estimate during congressional consideration of the underlying legislation that it would have an annual economic impact of \$119 million in 2008 and \$700 million over the 2008–2011 period. This was based on CBO’s estimate that 50,000 retirees and their dependents would stop using TRICARE in favor of an employer-sponsored plan. Based on an assessment of data in the Defense Eligibility Enrollment Reporting System (DEERS) of retirees and their dependents under age 65 identified as having other health insurance, as well as recent beneficiary survey data, DoD now believes the CBO estimate was too high, and that a better estimate is that the statutory change implemented by this final rule will yield annual budget savings of \$64 million for Fiscal Year 2010. Nonetheless, DoD continues to treat the final rule as an economically significant rule to maintain consistency with the proposed rule and because medical system cost growth in the future may raise the economic impact over the \$100 million per year threshold.

Executive Order No. 13,132 (Federalism)

DoD examined the impact(s) of the final rule under Executive Order 13,132 and believes that it does not have policies that have federalism implications that would have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government and states that, therefore, consultation with state and local officials is not required.