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January 16, 2018

The Honorable John McCain  
Chairman  
The Honorable Jack Reed  
Ranking Member  
Committee on Armed Services  
United States Senate

The Honorable Mac Thornberry  
Chairman  
The Honorable Adam Smith  
Ranking Member  
Committee on Armed Services  
House of Representatives

Subject: *Department of Defense, Office of the Secretary: TRICARE; Reimbursement of Long Term Care Hospitals and Inpatient Rehabilitation Facilities*

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, Office of the Secretary (DOD) entitled “TRICARE; Reimbursement of Long Term Care Hospitals and Inpatient Rehabilitation Facilities” (RIN: 0720-AB47). We received the rule on December 26, 2017. It was published in the *Federal Register* as a final rule on December 29, 2017. 82 Fed. Reg. 61,678.

According to DOD, the final rule establishes reimbursement rates for Long Term Care Hospitals (LTCHs) and Inpatient Rehabilitation Facilities (IRFs) in accordance with the statutory requirement that TRICARE inpatient care “payments shall be determined to the extent practicable in accordance with the same reimbursement rules as apply to payments to providers of services of the same type under Medicare.” This final rule adopts Medicare’s reimbursement methodologies for inpatient services provided by LTCHs and IRFs. Each reimbursement methodology will be phased in over a 3-year period. The final rule also removes the definitions for “hospital, long-term (tuberculosis, chronic care, or rehabilitation)” and “long-term hospital care,” and creates separate definitions for “Long Term Care Hospital” and “Inpatient Rehabilitation Facility” adopting the Centers for Medicare and Medicaid Services classification criteria. The final rule also includes authority for a year-end, discretionary General Temporary Military Contingency Payment Adjustment for inpatient services in TRICARE network IRFs when deemed essential to meet military contingency requirements.

The rule is effective March 5, 2018. The regulations setting forth the revised reimbursement systems shall be applicable for all admissions to Long Term Care Hospitals and Inpatient Rehabilitation Facilities, respectively, commencing on or after the first day of the month which is at least 120 days after the date of publication of the rule in the *Federal Register*.

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: Aaron Siegel  
Alternate OSD FRLO  
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; REIMBURSEMENT OF LONG TERM CARE HOSPITALS  
AND INPATIENT REHABILITATION FACILITIES”  
(RIN: 0720-AB47)

(i) Cost-benefit analysis

The Department of Defense (DOD) performed a cost benefit analysis on the final rule. According to DOD, consistent with Office of Management and Budget (OMB) Circular A-4, the effect of the rule is a transfer caused by a federal budget action; it does not impose costs, including private expenditures. The final rule is anticipated to reduce DOD allowed amounts to Long Term Care Hospitals (LTCHs) by approximately \$73 million in the first year of the transition, if implemented in FY 2019 when TRICARE site-neutral LTCH cases will be paid at the full applicable LTCH Prospective Payment System (PPS) payment amount. DOD allowed amounts to LTCHs would be reduced by \$86 million in the second year and \$98 million in the third and final year of the transition. DOD further states that the final rule is also anticipated to reduce DOD allowed amounts to Inpatient Rehabilitation Facilities (IRFs) by approximately \$24 million in FY 2019, which is anticipated to be the first year of the transition period, \$41 million in the second year, and \$57 million in the final year of transition.

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

The RFA requires agencies to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. For purposes of RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals are considered to be small entities, either by being nonprofit organizations or by meeting the Small Business Administration (SBA) identification of a small business (having revenues of \$34.5 million or less in any one year). For purposes of RFA, DOD determined that the majority of LTCHs and IRFs would be considered small entities according to the SBA size standards. Individuals and states are not included in the definition of a small entity. Therefore, the rule would have a significant impact on a substantial number of small entities. DOD states that the Regulatory Impact Analyses, as well as the contents contained in the preamble to the final rule, also serves as the Regulatory Flexibility Analysis.

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

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any one year of \$100 million in 1995 dollars, updated annually for inflation. That threshold level is currently approximately \$140 million. According to DOD, the final rule will not mandate any requirements for state, local, or tribal governments or the private sector.

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

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

On January 26, 2015, a TRICARE proposed rule was published in the *Federal Register*. 79 Fed. Reg. 51,127. It proposed to adopt a TRICARE LTCH PPS similar to the Center for Medicare and Medicaid Service's reimbursement system for LTCHs, with the exception of not adopting Medicare's LTCH 25 percent rule. This TRICARE proposed rule was subsequently withdrawn and replaced by the proposed rule published August 31, 2016. 81 Fed. Reg. 59,934. The August 2016 proposed rule provided a 60-day comment period. DOD summarized and responded to the public comments.

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

According to DOD, the rule will not impose significant additional information collection requirements on the public under PRA. Existing information collection requirements of the TRICARE and Medicare programs will be utilized.

Statutory authorization for the rule

DOD states that the final rule is authorized by 5 U.S.C. § 301, 10 U.S.C. chapter 55, and specifically, 10 U.S.C. § 1079(i)(2).

Executive Order No. 12,866 and 13,563 (Regulatory Planning and Review)

Executive Orders 12,866 and 13,563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis must be prepared for major rules with economically significant effects (\$100 million or more in any one year).

DOD estimated that the effects of the LTCH and IRF provisions that would be implemented by this rule would not result in LTCH or IRF revenue reductions exceeding \$100 million in any one year individually. However, when combined the revenue reductions would exceed \$100 million, making this rulemaking economically significant as measured by the \$100 million threshold. DOD prepared a Regulatory Impact Analyses that presents the costs and benefits of the rulemaking. The final rule is anticipated to reduce DOD allowed amounts to LTCHs by \$73 million and to IRFs by \$24 million in FY 2019 during the first year of transition.

Executive Order No. 13,132 (Federalism)

DOD examined the rule for its impact under Executive Order 13,132, and it does not contain 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. Therefore, DOD concluded that consultation with state and local officials was not required.