
DEPARTMENT OF DEFENSE
Office of the Secretary**32 CFR Part 199**

[DoD–2007–HA–0078; RIN 0720–AB17]

TRICARE; Relationship Between the TRICARE Program and Employer-Sponsored Group Health Plans**AGENCY:** Office of the Secretary, Department of Defense.**ACTION:** Proposed Rule.

SUMMARY: This proposed rule implements Section 1097c of Title 10, United States Code. 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. Cafeteria plans that comport with section 125 of the Internal Revenue Code will be permissible so long as the plan treats all employees the same and does not illegally take TRICARE eligibility into account.

DATES: Written comments received at the address indicated below by May 27, 2008 will be accepted.

ADDRESSES: You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Anne Giese, TRICARE Policy and Operations, TRICARE Management Activity, 5111 Leesburg Pike, Suite 810, Falls Church, VA, 22041, telephone (703) 681–0039.

SUPPLEMENTARY INFORMATION:**I. Background**

Section 707 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109–364) added Section 1097c to Title 10, United States Code. Section 1097c prohibits employers from offering financial or other incentives to certain TRICARE-eligible employees (essentially retirees and their family members) to not enroll in an employer-offered GHP in the same manner as employers are currently prohibited from offering incentives to Medicare-eligible employees under section 1862(b)(3)(C) of the Social Security Act (42 U.S.C. 1395y(b)(3)(C)). Many employers, including state and local governments, have begun to offer their employees who are TRICARE-eligible a TRICARE supplemental insurance as an incentive not to enroll in the employer's primary GHP. These actions shift thousands of dollars of annual health costs per employee to the Defense Department, draining resources from higher national security priorities. TRICARE, as is Medicare, is a secondary payer to employer-provided health insurance. In all instances where a TRICARE beneficiary is employed by a public or private entity and elects to participate in a GHP, reimbursements for TRICARE claims will be paid as a secondary payer to the TRICARE beneficiary's employer-sponsored GHP. TRICARE is not responsible for paying first as it relates to reimbursements for a TRICARE beneficiary's health care and the coordination of benefits with employer-sponsored GHPs.

An identified employer-sponsored health insurance plan will be the primary payer and TRICARE will be the secondary payer. TRICARE will generally pay no more than the amount it would have paid if there were no employer GHP. As applicable to both the Medicare and TRICARE secondary payer programs, the term "group health plan" means a plan (including a self-insured plan) of, or contributed to by, an employer (including a self-employed person) or employee organization to provide health care (directly or otherwise) to the employees, former employees, the employer, others associated or formerly associated with the employer in a business relationship, or their families. It should be noted that by including any plan of an employer to

provide health care to the employees, this definition is very broad. It should also be noted that Section 1097c also reaches to any other plan that would be primary to TRICARE.

Prohibition on incentives not to enroll in employer-sponsored GHPs is to prevent employers from shifting their responsibility for their employees onto the Federal taxpayers. Certain common employer benefits programs do not constitute improper incentives under the law. For example, supplemental insurance offered under an employer's cafeteria plan which comports with section 125 of the Internal Revenue Code would not be considered improper incentive, as long as it is not a TRICARE-exclusive plan.

A cafeteria plan is defined by the Internal Revenue Code, 26 U.S.C. 125(d), as a written plan under which all participants are employees and the participants may choose among two or more benefits consisting of cash and qualified benefits. Employers who adhere to the requirements of section 125 and offer all employees without regard to TRICARE eligibility a choice between health insurance and cash payment equivalents are not considered in violation of 42 U.S.C. 1395y(b)(3)(C). Therefore, if a TRICARE beneficiary elects the cash payment option as a benefit offered under the employer's cafeteria plan, one which meets section 125 requirements, then the employer would not be in violation of these provisions.

10 U.S.C. 1097c prohibits TRICARE supplemental insurance plans as an option for health coverage under an employer-sponsored GHP to TRICARE-eligible beneficiaries. Such plans cannot be included in cafeteria plans because they are not open to all employees, and constitute an improper incentive targeted only at TRICARE beneficiaries for not enrolling in the employer's main health plan option or options. Section 1097c does not impact TRICARE supplemental insurance plans that are not offered by an employer; but are sold by an insurer and/or beneficiary association working in conjunction with an insurer. Such non-employer-sponsored TRICARE supplemental insurance will continue to be expressly excluded as double coverage under 32 CFR 199.2(b) and 199.8(b)(4)(ii), so that TRICARE is the primary payer and the TRICARE Supplemental plan is the secondary payer. These plans have been sold by beneficiary associations or insurers.

Cafeteria plans. Cafeteria plans that comport with section 125 of the Internal Revenue Code are permissible. Additional requirements of any plan

offered by the employer are permissible so long as the plan treats all employees the same and does not illegally take TRICARE eligibility into account. The Conference Report accompanying the enactment of section 1097c made clear that supplemental insurance offered by employers through cafeteria plans are permissible under 1097c only if they are “non-TRICARE exclusive employer-provider health care incentives.” TRICARE-exclusive plans even if offered under cafeteria plans, are not allowed. However, an employer incentive not to enroll in the employer’s Group Health plan does not violate this new law if the incentive is available to and can be used by all employees, and not limited to employees who are also TRICARE beneficiaries. For example, non-TRICARE exclusive employer-provided health care incentives offered under an otherwise proper employer-sponsored Cafeteria Plan would not be a violation. Similarly, cash payments or other bona fide fringe benefits may properly be offered under the Services Contract Act in lieu of health care coverage so long as the employer does not consider TRICARE eligibility when formulating the cash payment or fringe benefits options for an employee.

It has been determined that the regulation is economically significant. An economic analysis has been completed.

II. Regulatory Enforcement

Enforcement of this prohibition is afforded through the authority provided by section 1097c: civil monetary penalties not to exceed \$5000 for each violation, investigative authorities of the Department of Defense Inspector General, recourse under the Debt Collection Improvement Act, 31 U.S.C. 3701 *et seq.*, and any other authority provided by law. Procedures for civil monetary penalties will be considered with reference to section 1097c(a)(2)(B), which authorizes agreements between DoD and the Department of Health and Human Services.

III. Regulatory Procedures

Executive Order 12866, “Regulatory Planning and Review” and Public Law 96–354, “Regulatory Flexibility Act” (5 U.S.C. 601)

Executive Order 12866 requires that a comprehensive regulatory impact analysis be performed on any economically significant regulatory action, defined as one that would result in an annual effect of \$100 million or more on the national economy or which would have other substantial impacts.

This rule is an economically significant regulatory action. The Regulatory Flexibility Act (RFA) requires that each Federal agency prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This rule will not have a significant impact on a substantial number of small entities for purposes of the RFA. This proposed rule is subject to an economic analysis.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3511)

This rule will not impose additional information collection requirements on the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3511).

Executive Order 13132, “Federalism”

We have examined the impact(s) of the proposed rule under Executive Order 13132 and 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, therefore, consultation with State and local officials is not required.

Section 202, Public Law 104–4, “Unfunded Mandates Reform Act”

This rule does not contain unfunded mandates. 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.

List of Subjects in 32 CFR Part 199

Claims, Health care, Health Insurance, Military personnel.

Accordingly, 32 CFR part 199 is proposed to be amended as follows:

PART 199—CIVILIAN HEALTH AND MEDICAL PROGRAM OF THE UNIFORMED SERVICES (CHAMPUS) [AMENDED]

1. The authority citation for part 199 continues to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. chapter 55.

2. Section 199.8 is amended by adding a new paragraph (d)(6) to read as follows:

§ 199.8 Double coverage.

* * * * *

(d) * * *

(6) *Prohibition against financial and other incentives not to enroll in a group health plan—(i) General rule.* An employer or other entity is prohibited from offering TRICARE beneficiaries financial or other benefits as incentives not to enroll in, or to terminate enrollment in, a group health plan that is, or would be, primary to TRICARE. This prohibition applies in the same manner as section 1862(b)(3)(C) of the Social Security Act applies to incentives for a Medicare-eligible employee not to enroll in a group health plan that is or would be primary to Medicare. This prohibition precludes offering to TRICARE beneficiaries an alternative to the employer primary plan unless:

(A) The beneficiary has primary coverage other than TRICARE; or

(B) The benefit is a Cafeteria Plan offered under Section 125 of the Internal Revenue Code and is offered to all employees, including non-TRICARE eligible employees.

(ii) *Remedies and penalties.* (A) Remedies for violation include, but are not limited to, remedies under the Federal Claims Collection Act, 31 U.S.C. 3701 *et seq.*

(B) Penalties for violation include a civil money penalty of up to \$5000 for each violation. The provisions of Section 1128A of the Social Security Act, 42 U.S.C. 1320a–7a, (other than subsections (a) and (b)) apply to the civil money penalty in the same manner as the provisions apply to a penalty or proceeding under Section 1128A.

(iii) *Definitions.* For the purposes of this paragraph (d)(6):

(A) The term ‘employer’ includes any State or unit of local government and any employer that employs at least 20 employees.

(B) The term ‘group health plan’ means a group health plan (as that term is defined in section 5000(b)(1) of the Internal Revenue Code of 1986 without regard to section 5000(d) of the Internal Revenue Code of 1986).

(C) The term ‘TRICARE-eligible employee’ means a covered beneficiary under section 1086 of title 10, United States Code, Chapter 55, entitled to health care benefits under the TRICARE program.

(iv) *Procedures.* The Departments of Defense and Health and Human Services are authorized to enter into agreements to further carry out this section.

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Dated: March 21, 2008.

L.M. Bynum,

*Alternate OSD Federal Register Liaison
Officer, Department of Defense.*

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