BILLING C

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

[Docket ID: DOD-2023-HA-0049]

RIN 0720-AB89

TRICARE; Removal of Certain Temporary Regulation Changes Made in Response to COVID-19

AGENCY: Office of the Assistant Secretary of Defense for Health Affairs (ASD(HA)), Department of Defense (DoD).

ACTION: Direct final rule.

SUMMARY: The ASD(HA) is issuing this direct final rule to remove certain temporary regulation changes put in place in response to the coronavirus disease 2019 (COVID-19) pandemic that were automatically terminated by the end of the President's national emergency and the associated Health and Human Services (HHS) Public Health Emergency (PHE). This rule is being published as a direct final rule as the Department does not expect to receive any adverse comments. If such comments are received, and are significant, this direct final rule will be withdrawn and a proposed rule for comments will be published.

DATES: The rule is effective on [INSERT 70 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] unless comments are received that would result in a contrary determination. Comments will be accepted on or before [INSERT 60 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]. If adverse comment is received, the DoD will publish a timely withdrawal of the rule in the *Federal Register*.

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

• Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions for submitting comments.

• Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350-1700.

Instructions: All submissions received must include the agency name and docket number or 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 https://www.regulations.gov as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Erica Ferron, 303-676-3626, erica.c.ferron.civ@health.mil.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statement of Need for This Rule

The ASD(HA) approved temporary modifications to TRICARE regulations in response to the COVID-19 pandemic and the President's national emergency for the COVID-19 outbreak (Proclamation 9994, 85 FR 15337). Two interim final rules (IFRs) implementing temporary changes to the TRICARE regulation were published on May 12, 2020 (85 FR 27921) and September 3, 2020 (85 FR 54914). These rules were finalized with changes in a final rule published June 1, 2022 (87 FR 33001), with one exception, which was the temporary coverage of the investigational drugs authorized by the Food and Drug Administration for treatment use for COVID-19 under expanded access programs. The temporary provisions in the IFRs, as modified by the final rule where applicable, were set to expire automatically, depending on the particular temporary provision, at: (1) the termination of the President's national emergency; (2) the termination of the associated HHS PHE; or (3) the termination of the Centers for Medicare and

Medicaid Services' (CMS's) Hospitals Without Walls initiative. Public Law 118-3 was enacted on April 10, 2023, immediately terminating the President's national emergency[1] and on May 11, 2023, the HHS Secretary announced the termination of the PHE.[2] When the PHE ended, the CMS Hospitals Without Walls initiative also terminated.[3] The ASD(HA) followed these terminations with an announcement in the FR on June 12, 2023, that the temporary provisions associated with the COVID-19 pandemic as published in the two discussed IFRs and two other IFRs had terminated in both the U.S. and in overseas locations (88 FR 38038). Because the provisions in the first IFR and all but one provision in the second IFR were finalized in a previous final rule, this direct final rule is necessary to remove from the TRICARE regulation the temporary provisions that were not made permanent in the final rule. This change is being published as a direct final rule as the public already had opportunity to provide comments on each IFR with neither generating significant comments (all comments were responded to in the final rule) and because all provisions being removed from the TRICARE regulation have already been terminated. Removing from the TRICARE regulation language which is no longer in effect is not expected to be controversial; as such, it is appropriate to publish this rule as a direct final rule.

This rule is being published as a direct final rule as the Department does not expect to receive any significant adverse comments concerning the removal of these temporary TRICARE provisions. If such comments are received, this direct final rule will be withdrawn and a proposed rule for comments will be published. If no such comments are received, this direct final rule will become effective 10 days after the public comment period expires.

For purposes of this rulemaking, a significant adverse comment is one that explains (1) why the rule is inappropriate, including challenges to the rule's underlying premise or approach;

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[1] https://www.govinfo.gov/content/pkg/PLAW-118publ3/pdf/PLAW-118publ3.pdf.
[2] https://www.hhs.gov/about/news/2023/05/11/hhs-secretary-xavier-becerra-statement-on-end-of-the-covid-19-public-health-emergency.html.
[3] https://www.cms.gov/files/document/hospitals-and-cahs-ascs-and-cmhcs-cms-flexibilities-fight-covid-19.pdf.

or (2) why the direct final rule will be ineffective or unacceptable without a change. In determining whether a significant adverse comment necessitates withdrawal of this direct final rule, the Department will consider whether the comment raises an issue serious enough to warrant a substantive response had it been submitted in a standard notice-and-comment process. A comment recommending an addition to the rule will not be considered significant and adverse unless the comment explains how this direct final rule would be ineffective without the addition.

B. Temporary Provisions Being Removed

The temporary provisions being removed by this rule are:

- 32 CFR 199.4(b)(3)(xiv): A temporary waiver of the requirement for a three-day prior hospital stay before admission to a skilled nursing facility.
- 32 CFR 199.6(b)(4)(i)(I): A temporary waiver of certain acute care hospital requirements for temporary hospitals and freestanding ambulatory surgery centers during the COVID-19 pandemic.
- 32 CFR 199.6(c)(2)(i): A temporary waiver of certain interstate and international licensing requirements for individual professional providers.
- 32 CFR 199.14(a)(1)(iii)(E)(*2*): Temporary adjustments to the diagnosis related group-based reimbursement amounts for patients diagnosed with COVID-19.
- 32 CFR 199.14(a)(9)(i): Temporary reimbursement of all long-term care hospitals (LTCHs) at the LTCH prospective payment system standard Federal rate.
- 32 CFR 199.17(l)(3)(iii): A temporary waiver of cost-shares and copayments associated with the use of telehealth services. This provision was ended by the final rule, but the language was not removed.

C. Legal Authority

The legal authority for this direct final rule is title 10, United States Code (U.S.C.), chapter 55. Within chapter 55, section 1071 creates the uniform program of medical benefits and dental care for uniformed Service members, former members and for their dependents, and

section 1073 authorizes the Secretary of Defense to administer the TRICARE Program and to make decisions implementing the benefits. All referenced sections can be found in 10 U.S.C. chapter 55, available at: https://uscode.house.gov/view.xhtml?path=/prelim@title10/subtitleA/part2/chapter55&edition=prelim.

D. Applicability

This rule will have a positive, if minor, impact on TRICARE's beneficiaries, providers, and health care contractors as removing temporary provisions from the TRICARE regulation that are no longer in effect will reduce confusion surrounding the applicability of those provisions.

E. Regulatory History

Each of the sections under which TRICARE is administered are revised every few years to ensure requirements continue to align with the evolving health care field. The specific provisions of §§ 199.4, 199.6, 199.14, and 199.17 were most recently amended in the final rule that finalized the IFRs impacted by this direct final rule. The rule finalized without change several temporary COVID-19-related provisions that are being removed by this direct final rule, but also made permanent TRICARE coverage of telephonic office visits, modified the temporary waiver of certain acute care hospital requirements for the duration of the President's national emergency for COVID-19, terminated the temporary waiver of telehealth cost-sharing, and permanently adopted Medicare's Hospital Value Based Purchasing program and New Technology Add-on Payments (with TRICARE-specific modifications).

II. Impact of This Regulation

The ASD(HA) approved numerous temporary regulation changes in response to the COVID-19 pandemic. The purpose of these changes was to ensure access to care during the national emergency and associated PHE, and that providers were adequately reimbursed for services during the emergency. Both the President's national emergency and the HHS PHE have

ended, actions which automatically ended each temporary COVID-19 flexibility not made permanent in the final rule.

Because each of the temporary provisions automatically ended at either the end of the President's national emergency for COVID-19 or the HHS PHE, all costs associated with the temporary provisions have already ended. As such, there is no monetary impact to removing the now-outdated language for these temporary provisions from the TRICARE regulation.

III. Regulatory Compliance Analysis

A. Executive Order 12866, "Regulatory Planning and Review," as amended by Executive Order 14094, "Modernizing Regulatory Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"

Executive Order 12866, as amended by 14094 (88 FR 21879, April 11, 2023), and Executive Order 13563 direct agencies to assess all costs, benefits and available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, safety effects, distributive impacts, and equity). These Executive orders emphasize the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated not significant, under section 3(f) of Executive Order 12866, as amended by Executive Order 14094.

B. Congressional Review Act (5 U.S.C. 801 et seq.)

Pursuant to the Congressional Review Act, this rule has not been designated a major rule, as defined by 5 U.S.C. 804(2).

C. Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

The ASD(HA) certified that this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

D. Sec. 202, Public Law 104-4, "Unfunded Mandates Reform Act"

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. This rule will not mandate any requirements for State, local, or Tribal governments, and will not affect private sector costs.

E. Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been determined that this direct final rule does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

F. Executive Order 13132, "Federalism"

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This rule will not have a substantial effect on State and local governments.

G. Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments"

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct compliance costs on one or more Indian tribes, preempts Tribal law, or effects the distribution of power and responsibilities between the Federal Government and Indian tribes. This rule will not have a substantial effect on Indian Tribal governments.

List of Subjects in 32 CFR Part 199

Administrative practice and procedure, Claims, Dental health, Fraud, Health care, Health insurance, Individuals with disabilities, Mental health programs, and Military personnel.

For the reasons stated in the preamble, the Department of Defense amends 32 CFR part 199 as follows:

PART 199–CIVILIAN HEALTH AND MEDICAL PROGRAM OF THE UNIFORMED SERVICES (CHAMPUS)

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

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

§ 199.4 [Amended]

2. Amend § 199.4 by removing the parenthetical sentence after the third sentence of paragraph (b)(3)(xiv).

§ 199.6 [Amended]

3. Amend § 199.6 by removing the note to paragraph (b)(4)(i)(I) and the last two sentences of paragraph (c)(2)(i).

§ 199.14 [Amended]

4. Amend § 199.14 by removing the last sentence of paragraph (a)(1)(iii)(E)(*2*) and the note to paragraph (a)(9)(i).

§ 199.17 [Amended]

5. Amend § 199.17 by removing paragraph (l)(3)(iii).

Dated: May 17, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer,

Department of Defense.

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