



THE ASSISTANT SECRETARY OF DEFENSE

**1200 DEFENSE PENTAGON
WASHINGTON, DC 20301-1200**

HEALTH AFFAIRS

MAY 9 2007

The Honorable Carl Levin
Chairman, Committee on Armed Services
United States Senate
Washington, DC 20510-6050

Dear Mr. Chairman:

The enclosed report responds to a request in the Conference Report accompanying the John Warner National Defense Authorization Act for Fiscal Year 2007 for the Secretary of Defense to report to Congress on the treatment of cafeteria plans and non-TRICARE exclusive employer-provided incentives under the Department's implementation of Section 707 of the Act. As enacted, Section 707 of the NDAA extends to TRICARE the same rule that currently applies to the Medicare program. Section 707 will prohibit employers or other entities from offering any financial incentive to employees also covered by a government health program not to enroll in the employer's group health plan.

The Department of Defense (DoD) is committed to careful implementation of this authority in a manner that will stop improper employer incentives aimed at shifting employer responsibilities to DoD, but leave undisturbed proper employer practices in the administration of lawful cafeteria plans that treat all employees equally.

Thank you for your continued interest in the Military Health System.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Ward Casscells", with a long, sweeping horizontal stroke extending to the right.

S. Ward Casscells, MD

Enclosure:
As stated

cc:
The Honorable John McCain
Ranking Member



THE ASSISTANT SECRETARY OF DEFENSE

1200 DEFENSE PENTAGON
WASHINGTON, DC 20301-1200

HEALTH AFFAIRS

MAY 9 2007

The Honorable Ben Nelson
Chairman, Subcommittee on Personnel
Committee on Armed Services
United States Senate
Washington, DC 20510-6050

Dear Mr. Chairman:

The enclosed report responds to a request in the Conference Report accompanying the John Warner National Defense Authorization Act for Fiscal Year 2007 for the Secretary of Defense to report to Congress on the treatment of cafeteria plans and non-TRICARE exclusive employer-provided incentives under the Department's implementation of Section 707 of the Act. As enacted, Section 707 of the NDAA extends to TRICARE the same rule that currently applies to the Medicare program. Section 707 will prohibit employers or other entities from offering any financial incentive to employees also covered by a government health program not to enroll in the employer's group health plan.

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S. Ward Casscells, MD

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As stated

cc:
The Honorable Lindsey O. Graham
Ranking Member



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WASHINGTON, DC 20301-1200**

HEALTH AFFAIRS

MAY 9 2007

The Honorable Ike Skelton
Chairman, Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515-6035

Dear Mr. Chairman:

The enclosed report responds to a request in the Conference Report accompanying the John Warner National Defense Authorization Act for Fiscal Year 2007 for the Secretary of Defense to report to Congress on the treatment of cafeteria plans and non-TRICARE exclusive employer-provided incentives under the Department's implementation of Section 707 of the Act. As enacted, Section 707 of the NDAA extends to TRICARE the same rule that currently applies to the Medicare program. Section 707 will prohibit employers or other entities from offering any financial incentive to employees also covered by a government health program not to enroll in the employer's group health plan.

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S. Ward Casscells, MD

Enclosure:
As stated

cc:
The Honorable Duncan Hunter
Ranking Member



THE ASSISTANT SECRETARY OF DEFENSE

**1200 DEFENSE PENTAGON
WASHINGTON, DC 20301-1200**

HEALTH AFFAIRS

MAY 9 2007

The Honorable Vic Snyder
Chairman, Subcommittee on Military Personnel
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515-6035

Dear Mr. Chairman:

The enclosed report responds to a request in the Conference Report accompanying the John Warner National Defense Authorization Act for Fiscal Year 2007 for the Secretary of Defense to report to Congress on the treatment of cafeteria plans and non-TRICARE exclusive employer-provided incentives under the Department's implementation of Section 707 of the Act. As enacted, Section 707 of the NDAA extends to TRICARE the same rule that currently applies to the Medicare program. Section 707 will prohibit employers or other entities from offering any financial incentive to employees also covered by a government health program not to enroll in the employer's group health plan.

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S. Ward Casscells, MD

Enclosure:
As stated

cc:
The Honorable John McHugh
Ranking Member



THE ASSISTANT SECRETARY OF DEFENSE

**1200 DEFENSE PENTAGON
WASHINGTON, DC 20301-1200**

HEALTH AFFAIRS

MAY 9 2007

The Honorable Robert C. Byrd
Chairman, Committee on Appropriations
United States Senate
Washington, DC 20510-6025

Dear Mr. Chairman:

The enclosed report responds to a request in the Conference Report accompanying the John Warner National Defense Authorization Act for Fiscal Year 2007 for the Secretary of Defense to report to Congress on the treatment of cafeteria plans and non-TRICARE exclusive employer-provided incentives under the Department's implementation of Section 707 of the Act. As enacted, Section 707 of the NDAA extends to TRICARE the same rule that currently applies to the Medicare program. Section 707 will prohibit employers or other entities from offering any financial incentive to employees also covered by a government health program not to enroll in the employer's group health plan.

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S. Ward Casscells, MD

Enclosure:
As stated

cc:
The Honorable Thad Cochran
Ranking Member



THE ASSISTANT SECRETARY OF DEFENSE

**1 200 DEFENSE PENTAGON
WASHINGTON, DC 20301-1200**

HEALTH AFFAIRS

MAY 9 2007

The Honorable Daniel K. Inouye
Chairman, Subcommittee on Defense
Committee on Appropriations
United States Senate
Washington, DC 20510-6028

Dear Mr. Chairman:

The enclosed report responds to a request in the Conference Report accompanying the John Warner National Defense Authorization Act for Fiscal Year 2007 for the Secretary of Defense to report to Congress on the treatment of cafeteria plans and non-TRICARE exclusive employer-provided incentives under the Department's implementation of Section 707 of the Act. As enacted, Section 707 of the NDAA extends to TRICARE the same rule that currently applies to the Medicare program. Section 707 will prohibit employers or other entities from offering any financial incentive to employees also covered by a government health program not to enroll in the employer's group health plan.

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S. Ward Casscells, MD

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As stated

cc:
The Honorable Ted Stevens
Ranking Member



THE ASSISTANT SECRETARY OF DEFENSE

**1200 DEFENSE PENTAGON
WASHINGTON, DC 20301-1200**

HEALTH AFFAIRS

MAY 9 2007

The Honorable David R. Obey
Chairman, Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515-6015

Dear Mr. Chairman:

The enclosed report responds to a request in the Conference Report accompanying the John Warner National Defense Authorization Act for Fiscal Year 2007 for the Secretary of Defense to report to Congress on the treatment of cafeteria plans and non-TRICARE exclusive employer-provided incentives under the Department's implementation of Section 707 of the Act. As enacted, Section 707 of the NDAA extends to TRICARE the same rule that currently applies to the Medicare program. Section 707 will prohibit employers or other entities from offering any financial incentive to employees also covered by a government health program not to enroll in the employer's group health plan.

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S. Ward Casscells, MD

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As stated

cc:
The Honorable Jerry Lewis
Ranking Member



THE ASSISTANT SECRETARY OF DEFENSE

1200 DEFENSE PENTAGON
WASHINGTON, DC 20301-1200

HEALTH AFFAIRS

MAY 9 2007

The Honorable John P. Murtha
Chairman, Subcommittee on Defense
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515-6018

Dear Mr. Chairman:

The enclosed report responds to a request in the Conference Report accompanying the John Warner National Defense Authorization Act for Fiscal Year 2007 for the Secretary of Defense to report to Congress on the treatment of cafeteria plans and non-TRICARE exclusive employer-provided incentives under the Department's implementation of Section 707 of the Act. As enacted, Section 707 of the NDAA extends to TRICARE the same rule that currently applies to the Medicare program. Section 707 will prohibit employers or other entities from offering any financial incentive to employees also covered by a government health program not to enroll in the employer's group health plan.

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Thank you for your continued interest in the Military Health System.

And thank you for your visits to Walter Reed

Sincerely,

It really boosts the spirits of everyone there

Gratefully,

S. Ward Casscells, MD

Enclosure:
As stated

cc:
The Honorable C. W. Bill Young
Ranking Member

REPORT TO CONGRESS ON THE RELATIONSHIP WITH EMPLOYER SPONSORED GROUP HEALTH PLANS

House Conference Report 109-702, accompanying the John Warner National Defense Authorization Act (NDAA) for Fiscal Year 2007, requests the Secretary of Defense to report to the House and Senate Armed Services Committees on the treatment of cafeteria plans and non-TRICARE exclusive employer-provided incentives under the Department's implementation of section 707 of the Act regarding employer sponsored group health care plans. As enacted, section 707 added to title 10, United States Code, section 1097c, which extends to TRICARE the same prohibition on offering financial or other incentives not to enroll in a Group Health Plan (GHP) that currently applies to Medicare under section 1862(b)(3)(C) of the Social Security Act (42 U.S.C. 1395y(b)(3)(C)). That law provides in pertinent part:

(C) Prohibition of financial incentives not to enroll in a group health plan or a large group health plan

It is unlawful for an employer or other entity to offer any financial or other incentive for an individual entitled to benefits under [Medicare] not to enroll (or to terminate enrollment) under a group health plan or a large group health plan which would (in the case of such enrollment) be a primary plan.... Any entity that violates the previous sentence is subject to a civil money penalty of not to exceed \$5,000 for each such violation.

10 U.S.C. 1097c, as added by section 707, becomes effective January 1, 2008.

The Conference Report further requests the Secretary of Defense to assess and report on the treatment of such plans under the Medicare Secondary Payer statute and make recommendations to ensure the fair treatment of all TRICARE beneficiaries.

The Department has reviewed the Medicare prohibition on GHP incentives, and intends to follow closely those rules in applying the comparable prohibition to TRICARE. Medicare law and implementing governance prohibit financial and other incentives to Medicare beneficiaries not to enroll or to terminate enrollment in a GHP that would be primary to Medicare. This is part of the Medicare Secondary Payer (MSP) Program. Under the MSP program, Medicare is the secondary payer to group health insurance provided for employees; in these cases Medicare pays after the employer-sponsored health insurance pays a claim. When an employer-sponsored health insurance plan is covered by the MSP rules and Medicare is the secondary payer, Medicare will generally pay no more than the amount it would have paid if there were no employer group health plan. As described in section 1862(b) of the Social Security Act, MSP applies to:

- Health plans offered by an employer to current employees (where the employer has 20 or more full- or part-time employees) that cover workers and their spouses age 65 and older.
- Large group health plans offered by an employer to current employees (where the employer has 100 or more full- or part-time employees) that cover an employee or family member who is disabled.
- Health plans offered by an employer, which cover an individual with end-stage renal disease (ERSD).

If the MSP rules do not apply, Medicare, not the employer-sponsored health plan, pays first and the private health insurance plan becomes secondary to Medicare. MSP rules do not apply to insurance:

- That covers workers or their spouses on Medicare due to age, when an employer has fewer than 20 employees.
- That covers workers or their spouses on Medicare due to disability, when an employer has fewer than 100 employees.
- Offered by an employer after someone with ESRD has been on Medicare for 30 months.
- Offered by employer that does not cover current employees. This includes retiree health insurance and COBRA 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 group health plan. By law, TRICARE is not responsible for paying first as it relates to reimbursements for TRICARE beneficiary's health care and the coordination of benefits with employer-sponsored GHPs.

The reason Medicare law includes the 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. In implementing this law, the Centers for Medicare and Medicaid Services (CMS) has clarified that certain common employer benefits programs do not constitute improper incentives under the law. For example, in general, CMS does not treat cash payments to an employee as an improper incentive, so long as any such cash payment is based on the employee's election as a benefit offered as part of an employer's cafeteria plan which comports with section 125 of the Internal Revenue Code.

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. DoD will parallel

Medicare's MSP rules relating to section 125 cafeteria plans. Under Medicare law, a cafeteria plan is not considered an unlawful incentive if the requirements of section 125 are followed and all employees are treated the same, to include those without an entitlement to Medicare. Employers who adhere to the requirements of section 125 and offer employees 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 Medicare 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 the MSP provisions. TRICARE will adopt an identical rule with respect to TRICARE beneficiaries eligible for an employer's cafeteria plan.

Once implemented, 10 U.S.C. 1097c will prohibit "TRICARE Supplement" plans as an option for health coverage under an employer-sponsored GHP to TRICARE eligible beneficiaries. Such plans could not be included in cafeteria plans because they are not open to all employees, but would constitute an improper incentive targeted only at TRICARE beneficiaries not enrolling in the employer's main health plan option or options. Section 1097c will have no impact on "TRICARE Supplement" 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 Supplement Plans will continue to be expressly excluded as double coverage under 32 CFR 199.2(b) and 199.8(b)(4)(ii). These plans have been sold by beneficiary associations or insurers.

However, many employers, including state and local governments, have begun to offer their employees who are TRICARE eligible a TRICARE Supplement 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. This is what 10 U.S.C. 1097c is designed to stop.

DoD will soon issue an interim final rule to codify all rules and governing authorities pertinent to effectuating the requirements of 10 U.S.C. 1097c, and will include the treatment of cafeteria plans and other employer provided incentives under the Department's implementation of the provision.

The interim final rule will closely track CMS regulations and associated guidance. Employers will be prohibited from offering TRICARE eligible employees financial or other benefits not to enroll or to disenroll from the employer's group health plan that is or would be primary to TRICARE. Cafeteria plans that comport with section 125 of the Internal Revenue Code will be 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. Because Group Health Plans

are defined as plans offered by an employer that has 20 or more employees, small businesses with fewer than 20 employees will be exempt from this prohibition.

The Department expects to enforce this prohibition 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 USC 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.

The interim final rule will also be consistent with other provisions of section 1097c, including the protection of TRICARE-eligible employees' rights to participate in employer-sponsored GHPs to the same extent as similarly situated employees who are not TRICARE eligible. In addition, the rule will reiterate the command of section 1097c that it does not affect any TRICARE beneficiary's eligibility for services and benefits under the Military Health System. Finally, DoD will conduct outreach, as called for in section 1097c(e), to inform beneficiaries of the rights and responsibilities of beneficiaries and employers under the law.

The Department of Defense is committed to careful implementation of section 1097c in a manner that will stop improper employer incentives aimed at shifting employer responsibilities to DoD, but leave undisturbed proper employer practices in the administration of lawful cafeteria plans that treat all employees equally.