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United States General Accounting Office
Washington, DC 20548

B-287058

January 23, 2001

The Honorable Chuck Grassley
Chairman
The Honorable Max Baucus
Ranking Member
Committee on Finance
United States Senate

The Honorable Billy Tauzin
Chairman
The Honorable John D. Dingell
Ranking Minority Member
Committee on Energy and Commerce
House of Representatives

The Honorable Bill Thomas
Chairman
The Honorable Charles Rangel
Ranking Minority Member
Committee on Ways and Means
House of Representatives

Subject: Department of the Treasury, Internal Revenue Service; Department of Labor, Pension and Welfare Benefits Administration; and Department of Health and Human Services, Health Care Financing Administration: Interim Final Rules for Nondiscrimination in Health Coverage in the Group Market

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on major rules promulgated by the Department of the Treasury, Internal Revenue Service; Department of Labor, Pension and Welfare Benefits Administration; and Department of Health and Human Services, Health Care Financing Administration, entitled "Interim Final Rules for Nondiscrimination in Health Coverage in the Group Market" (RIN: 1545-AW02; 1210-AA77; 0938-AI08). We received the rules on January 5, 2001. It was published in the Federal Register as interim final rules with request for comments on January 8, 2001. 66 Fed. Reg. 1378.

The interim final rules prohibit discrimination based on a health factor for group health plans and issuers of health insurance coverage offered in connection with a

group health plan. The rules implement the provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Enclosed is our assessment of the departments' 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 indicates that the departments complied with the applicable requirements. If you have any questions about this report, please contact James W. Vickers, Assistant General Counsel, at (202) 512-8210.

Our Office recently issued another report in this area entitled Implementation of HIPAA: Progress Slow in Enforcing Federal Standards in Nonconforming States (GAO/HEHS-00-85, March 2000). For information about that report or other GAO evaluation work relating to the subject matter of the rules contact William Scanlon, Managing Director, Health Care. Mr. Scanlon can be reached at (202) 512-7114.

Kathleen E. Wannisky
Managing Associate General Counsel

Enclosure

cc: Chief, Regulations Unit
Internal Revenue Service
Department of the Treasury

Assistant Secretary
Pension and Welfare Benefits Administration
Department of Labor

Deputy Executive Secretary to
the Department
Department of Health and Human Services

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF MAJOR RULES
ISSUED BY THE
DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE; DEPARTMENT OF LABOR,
PENSION AND WELFARE BENEFITS ADMINISTRATION; AND
DEPARTMENT OF HEALTH AND HUMAN SERVICES,
HEALTH CARE FINANCING ADMINISTRATION
ENTITLED
"INTERIM FINAL RULES FOR NONDISCRIMINATION IN
HEALTH COVERAGE IN THE GROUP MARKET"
(RIN: 1545-AW02; 1210-AA77; 0938-AI08)

(i) Cost-benefit analysis

The departments assessed the benefits, costs, and transfers of the interim final rules.

Since the analysis distinguishes between costs and transfers, the only costs, according to the departments, are the one-time costs of amending plans and revising materials (\$8 million) and of notifying employees of enrollment opportunities (\$11 million).

According to the departments, the premiums and claims costs incurred by group health plans to provide coverage to individuals who were previously denied coverage or offered restricted coverage based on health factors are offset by the commensurate or greater benefits realized by the newly eligible participants on whose behalf the premiums or claims are paid. As such, these premiums and claims costs are characterized as transfers rather than new economic costs. These transfers shift the burden of health care costs from one party to another without any direct change in aggregate social welfare.

For example, as an insured's status changes from an individual policy to an employment-based group policy, health care costs are transferred from these individuals to their employers. Likewise, when an uninsured individual becomes insured through a group policy, the health care costs are transferred from the individual and public funding sources to employers.

The departments estimate that these transfers will be more than \$400 million annually, which is less than 1 percent of the \$431 billion group health plans spend to cover 77 million participants and their dependents.

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

Because the rules are being issued as interim final rules and not as a notice of proposed rulemaking, the Regulatory Flexibility Act does not apply. However, the departments state that the impact of the rules on small entities (small employee benefit plans) was considered in the drafting of the rules.

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

The interim final rules do not contain an intergovernmental or private sector mandate, as defined in title II, of more than \$100 million 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.*

These rules follow the issuance of interim final rules that were published in the Federal Register on April 8, 1997. 62 Fed. Reg. 16894. On December 29, 1997, the departments published a clarification of the April rules as they related to individuals who were denied coverage on the basis of any health factor before the effective date of HIPAA. Comments which were submitted in response to the April rules are discussed in the preamble to the instant interim final rules.

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

All three departments' rules contain information collections that are subject to review by the Office of Management and Budget under the Paperwork Reduction Act. The preamble to the final rules contains the details of the collections that are required by the Act. The collections have been submitted to OMB on an emergency approval basis.

Statutory authorization for the rule

The interim final rules were promulgated pursuant to the authority of the following statutes:

--The Department of the Treasury: Sections 7805 and 9833 of the Internal Revenue Code of 1986 (26 U.S.C. 7805 and 9833).

--The Department of Labor: Sections 107, 209, 505, 701-703, 711-713, and 731-734 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1027, 1059, 1135, 1171-1173, 1181, 1182, and 1191-1194), as amended by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Public Law 104-191, 110 Stat. 1936), Mothers' Health Protection Act and Newborns' and Mothers' Health

Protection Act of 1996 (MHPA and NMHPA) (Public Law 104-204, 110 Stat. 2395). and the Womens' Health and Cancer Rights Act of 1998 (WHCRA)(Public Law 105-277, 112 Stat. 2681-436), section 101(g)(4) of HIPAA, and Secretary of Labor's Order No. 1-87, 52 Fed. Reg. 13139, April 21, 1987.

--The Department of Health and Human Services: Sections 2701 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg through 300gg-63, 300gg-91, and 300gg-92), as amended by HIPAA, MHPA, NMHPA, and WHCRA.

Executive Order No. 12866

The interim final rules were reviewed by the Office of Management and Budget and found to be "economically significant" regulatory actions.

Executive Order No. 13132 (Federalism)

The departments have found that the interim final rules do not have federalism implications under the order. The preamble to the interim final rules contains a discussion of the preemptive effect of section 514 of ERISA and the congressional intent of the narrowest preemption of state laws regarding health insurance plans.