

Dated: August 23, 2001.

**Dave D. Lauriski,**

*Assistant Secretary of Labor for Mine Safety and Health.*

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 153

#### Legal Assistance Matters

**AGENCY:** Department of Defense.

**ACTION:** Final rule.

**SUMMARY:** This part establishes a uniform approach for the execution of military testamentary instruments (including wills), powers of attorney, and advance medical directives. It seeks public comment on specific aspects of the activity.

**DATES:** This rule is effective June 12, 2001. Comments must be received by October 29, 2001.

**ADDRESSES:** Written comments and recommendations should be sent to the Office of the Under Secretary of Defense for Personnel & Readiness, Program Integration, Legal Policy, ATTN: Lt. Col. Patrick Lindemann, 4000 Defense Pentagon, Washington, DC 20301-4000.

**FOR FURTHER INFORMATION CONTACT:** Lt. Col. K. Kinlin, (703) 697-3387.

#### SUPPLEMENTARY INFORMATION:

#### Executive Order 12866, "Regulatory Planning and Review"

It has been determined that 32 CFR part 153 is not a significant regulatory action. The rule does not:

(1) Have an annual effect to the economy of \$100 million or more or adversely affect in a material way the economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

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

It has been 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. This rule is being published to give notice to state attorneys and paralegals of 10 U.S.C. § 1044d. The Directive establishes a uniform approach for the execution of military testamentary instruments. Military testamentary instruments have the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate. Thus, it is exempt from any requirement of form, formality, or recording before probate that is provided for testamentary instruments under the laws of a State.

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

It has been certified that this part does not impose any reporting or record keeping requirements under the Paperwork Reduction Act of 1995.

#### Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"

It has been certified that this rule does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and that such rulemaking will not significantly or uniquely affect small governments.

#### Executive Order 13132, "Federalism"

It has been certified that this rule does not have federalism implications. The rule does not 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.

#### List of Subjects in 32 CFR Part 153

Military law, Military personnel.

Accordingly, 32 CFR part 153 is added to subchapter D to read as follows:

#### PART 153—LEGAL ASSISTANCE MATTERS

Sec.

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Appendix A to part 153—Military Testamentary Preamble

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Appendix C to part 153—Military Power of Attorney Preamble

Appendix D to part 153—Military Advance Medical Directive Preamble

**Authority:** 10 U.S.C. 301.

#### § 153.1 Purpose.

This part implements 10 U.S.C. 301 for persons eligible for military legal assistance by establishing a uniform approach for the execution of military testamentary instruments.

#### § 153.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as "the DoD Components"). The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps, and the Coast Guard when it is operating as a service in the Department of the Navy.

#### § 153.3 Definitions.

*Estate planning.* The continuing process of arranging for the use, conservation, and transfer of one's property and wealth during life and upon death. The process produces a plan that may include some or all of these: A testator/testatrix will, military testamentary instrument, a trust, life insurance, an advance medical directive, a healthcare power of attorney, designation of anatomical gifts, and other dispositive documents.

*Military advance medical directive.* A written document, prepared in accordance with this Part, which explains one's wishes about medical treatment if one becomes incompetent or unable to communicate, or which governs the withholding or withdrawal of life-sustaining treatment from the maker of the document in the event of an incurable or irreversible condition that will cause death within a relatively short period of time, and when the maker is no longer able/competent to make decisions regarding his/her medical treatment.

*Military legal assistance counsel.* A judge advocate, as defined in 10 U.S.C. 801(13) or a civilian attorney serving as a legal assistance officer, under the provisions of 10 U.S.C. 1044.

*Military power of attorney.* A written instrument prepared in accordance with this part, whereby one person, as principal, appoints another as his/her agent and confers authority to perform certain specified acts, kinds of acts or

full authority to act on behalf of the principal.

*Military testamentary instrument.* An instrument that is prepared with testamentary intent in accordance with this part and that:

(a) Is executed in accordance with this part (§ 153.4 (b)) by (or on behalf of) a person, as a testator/testatrix, who is eligible for military legal assistance.

(b) Makes a disposition of property of the testator/testatrix, and takes effect upon the death of the testator/testatrix. It has the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate. However, it is exempt from any requirement of form, formality, or recording before probate that is provided for testamentary instruments under the laws of a State.

*Testator/Testatrix.* A person who makes a will or military testamentary instrument disposing of his or her property at death.

*Will.* A written instrument prepared consistent with State law for a testator/testatrix to dispose of the testator/testatrix property upon the testator/testatrix death. A will is often the principal document in an individual's estate plan.

**§ 153.4 Policy.**

It is DoD policy that:

(a) *General.* (1) Although not every person needs a will or military testamentary instrument, all military personnel shall consider the advisability of making either. Whether a will or military testamentary instrument is necessary or desirable, and its form and execution, depend on the individual's desires, circumstances and the intestate succession laws of the appropriate State. Ultimately, those eligible for legal assistance must decide for themselves whether to prepare any estate planning document(s).

(2) The Military Departments, within the limits of available resources and expertise, shall inform and educate persons eligible for legal assistance on estate planning generally, and the advisability of preparing a will or military testamentary instrument. It is especially important that military personnel be educated with respect to these matters before mobilization, deployment, or similar actions.

(3) All commanding officers shall urge military personnel to seek legal counsel regarding an estate plan well before mobilization, deployment, or similar activities. However, any testamentary instrument, to be legally effective, must be the free and voluntary act of the person making it.

(b) *Military testamentary instrument.* A military testamentary instrument shall:

(1) Be executed by the testator/testatrix (or, if the testator/testatrix is unable to execute the instrument personally, executed in the presence of, by the direction of, and on behalf of the testator/testatrix).

(2) Be executed in the presence of a military legal assistance counsel acting as presiding attorney.

(3) Be executed in the presence of at least two disinterested witnesses (in addition to the presiding attorney), each of whom attests to witnessing the testator/testatrix execution of the instrument by signing it.

(4) Include a statement or preamble in form and content, substantially as outlined at appendix A to this part.

(5) Include (or have attached to it), a self-proving affidavit, in a form and content, substantially as outlined at appendix B to this part

(c) *Military power of attorney.* 10 U.S.C. 1044b requires recognition of powers of attorney prepared for persons eligible for legal assistance. If prepared, such documents will include a statement or preamble in form and content, substantially as outlined at appendix C to this part.

(d) *Military advance medical directive.* Section 1044c of 10 U.S.C. requires recognition of military advance medical directives prepared for persons eligible for legal assistance. If prepared, such documents will include a statement or preamble in form and content, substantially as outlined at enclosure 4.

(e) *Reserve component members.* Subject to the availability of legal staff resources, the Secretaries of the Military Departments may provide legal assistance in connection with their personal civil legal affairs to members of Reserve components and their dependents, following release from active duty under a call or order to active duty for more than 30 days issued under a mobilization authority (as determined by the Secretary of Defense). Eligibility for such legal assistance shall be for a period of time that begins on the date of the release and is not less than twice the length of the period served on active duty under that call or order to active duty.

**§ 153.5 Responsibilities.**

(a) The Under Secretary of Defense (Personnel and Readiness) shall manage implementation of this part.

(b) The Secretaries of the Military Departments shall insure compliance with this part and establish policies and procedures to implement this part.

**Appendix A to Part 153—Military Testamentary Preamble**

This is a MILITARY TESTAMENTARY INSTRUMENT prepared pursuant to section 1044d of title 10, United States Code, and executed by a person authorized to receive legal assistance from the Military Services. Federal law exempts this document from any requirement of form, formality, or recording that is provided for testamentary instruments under the laws of a State, the District of Columbia, or a commonwealth, territory, or possession of the United States. Federal law specifies that this document shall receive the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate. It shall remain valid unless and until the testator revokes it.

**Appendix B to Part 153—Military Testamentary Instrument Self-Proving Affidavit**

Affidavit with the Armed Forces at \_\_\_\_\_  
We, the testator/testatrix and the witnesses, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that in the presence of a military legal assistance counsel and the witnesses the testator/testatrix signed and executed the instrument as the testator/testatrix military testamentary instrument and that [he][she] had signed willingly (or willingly directed another to sign for [him][her]), and that [he][she] executed it as [his][her] free and voluntary act for the purposes therein expressed. It is further declared that each of the witnesses, in the presence and hearing of the testator/testatrix and a military legal assistance counsel, signed the military testamentary instrument as witness and that to the best of [his][her] knowledge the testator/testatrix was at that time eighteen years of age or older or emancipated, of sound mind, and under no constraint or undue influence.

\_\_\_\_\_  
Testator/Testatrix

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Print Name

Subscribed, sworn to and acknowledged before me by the testator/testatrix, and subscribed and sworn to before me by the witnesses, this date \_\_\_\_.

(Signed)

\_\_\_\_\_  
(Official Capacity of Person Administering the Oath)

### Appendix C to Part 153—Military Power of Attorney Preamble

This is a military Power of Attorney prepared pursuant to section 1044b of title 10, United States Code, and executed by a person authorized to receive legal assistance from the Military Service. Federal law exempts this power of attorney from any requirement of form, substance, formality, or recording that is prescribed for powers of attorney by the laws of a State, the District of Columbia, or a commonwealth, territory, or possession of the United States. Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.

### Appendix D to Part 153—Military Advance Medical Directive

This is a military advance medical directive prepared pursuant to section 1044c of title 10, United States Code. It was prepared by an attorney authorized to provide legal assistance for an individual eligible to receive legal assistance under section 1044 of title 10, United States Code. Federal law exempts this advance medical directive from any requirement of form, substance, formality, or recording that is provided for advance medical directives under the laws of a State. Federal law specifies that this advance medical directive shall be given the same legal effect as an advance medical directive prepared and executed in accordance with the laws of the State concerned.

Dated: August 22, 2001.

**L.M. Bynum,**

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

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## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 199

[RIN 0720-AA58]

### TRICARE; Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Payments for Professional Services in Low-Access Locations

**AGENCY:** Office of the Secretary, DOD.

**ACTION:** Final rule.

**SUMMARY:** This final rule implements 10 U.S.C. 1097b(a), as added by section 716 of the National Defense Authorization Act for Fiscal Year 2000 which allows higher provider reimbursement rates than normally allowable, with certain limitations, when necessary to ensure an adequate TRICARE Prime network of qualified providers. This final rule also

implements 10 U.S.C. 1079(h)(5), as added by section 747 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, to remedy circumstances in which TRICARE beneficiaries face very severe limitations on access to needed health care services.

**EFFECTIVE DATE:** September 27, 2001.

**ADDRESSES:** TRICARE Management Activity (TMA), Program Operations Directorate, 5111 Leesburg Pike, Suite 810, Falls Church, VA 22041-3206.

**FOR FURTHER INFORMATION CONTACT:** Mr. Mike Talisnik, Office of the Assistant Secretary of Defense (Health Affairs)/TRICARE Management Activity, telephone (703) 681-0064 or Mr. Stan Regensberg, telephone (303) 676-3742.

Questions regarding payment of specific claims under the CHAMPUS allowable charge method should be addressed to the appropriate TRICARE/CHAMPUS contractor.

#### SUPPLEMENTARY INFORMATION:

#### I. Background on TRICARE and CHAMPUS Payments to Providers

The relationship of DoD payment levels to Medicare's for institutional and professional health care services is central to the ongoing success of TRICARE. Payment levels have significant effects on DoD's ability to implement managed care programs, to assure beneficiary access to the full spectrum of health services, and to do this in a cost-effective manner.

Legislative initiatives have linked DoD's payment rates for health care to Medicare, beginning in the early 1980s, with the initial focus on institutional services. Similar initiatives in the late 1980s linked DoD's payment levels for professional services to Medicare.

A key principle of DoD's efforts in the linkage of reimbursement rates to Medicare has been the protection of access to services. In a 1996 report to Congress, it was found that 86 percent of the time providers accepted the TRICARE payment limits called CMACs (CHAMPUS Maximum Allowable Charges) as payment in full. Most recently, that percentage has increased to over 94 percent acceptance. However, the very high rate of acceptance overall may hide the access problems in certain localities.

When the CMAC payment approach was implemented in 1992, national payment levels were adjusted to reflect local economic conditions in over 200 localities, the same as those used by Medicare. Since that time, the number of localities has been reduced to fewer than 100, with the introduction of more and more statewide payment localities.

In 1999, DoD undertook revisions to one statewide locality, Alaska, in recognition of the differences in acceptability of TRICARE payments in Anchorage compared to the rest of the state. Overall, CMAC's are accepted as full payment over 90 percent of the time in Alaska; however, the vast majority of services are provided in Anchorage, so that severe access problems elsewhere in the state are hidden. In an effort to increase acceptability of TRICARE payment rates outside of Anchorage, DoD created a new locality, including all of Alaska except Anchorage. While this action addressed one locality, DoD's current regulatory authority may not be sufficient in some other localities. Accordingly, this final rule provides for the mechanism to increase access to health care providers for TRICARE beneficiaries where access to health care services is severely impaired or where there is an inadequate number of qualified network providers.

#### II. Overview of the Rule

This final rule would add a new § 199.14(h)(1)(iv)(D) authorizing the establishing of higher payment rates for specific services than would otherwise be allowable, if it is determined that access to health care services is severely impaired. Payment rates could be established through addition of a percentage factor to an otherwise applicable payment amount, or by calculating a prevailing charge, or by using another governmental payment rate. Higher payment rates could be applied to all similar services performed in a locality, or a new locality could be defined for application of the higher payment rates.

Other factors in determining the authority to establish a higher payment shall be based on the number of providers in a locality, the number of providers who are TRICARE participating providers, the number of eligible beneficiaries in the locality, and the availability of Military Treatment Facility providers.

The final rule would also add a new § 199.14(h)(1)(iv)(E) allowing the reimbursement of higher payment rates for health care services for services that would otherwise be allowable, if it is determined necessary to ensure adequate Preferred Provider networks. The amount of reimbursement for health care services would be limited to the lesser of: (1) An amount equal to the local fee for service charge in the area where the service is provided; or (2) 115 percent of the otherwise allowable TRICARE rate for the service. The higher rate will be authorized only if all reasonable efforts have been exhausted